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In The
Supreme Court of the United States

October Term 1997

MICHAEL BRUCE SASSANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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105 pp

QUESTION PRESENTED

Whether, at the sentencing of a defendant suffering from a mental disorder, a downward departure from the guideline range based on "significantly reduced mental capacity" under Guideline Section 5K2.13 can be based on an inability to control behavior, that is, volitional disorders, as has been held by two Circuits, and strongly supported by a third Circuit and as is now proposed by the Sentencing Commission itself, or are downward departures restricted to certain cognitive mental disorders that render the defendant unable to process information or to reason, as has been held by three other Circuits?

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PETITION FOR A WRIT OF CERTIORARI

Michael Bruce Sassani respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit, dated March 4, 1998, is unpublished, and is reported at No. 97-4011, 1998 U.S. App. Lexis 89875 (4th Cir. March 4, 1998) (per curiam) and is reprinted in the appendix to the Petition at App. 1-16. The order of the United States Court of Appeals for the Fourth Circuit denying petitioner's timely motion for rehearing, issued March 31, 1998, is unreported and is reprinted in the appendix at App. 24. The oral opinion of the United States District Court for the District of Maryland, issued December 13, 1996, is reprinted in the appendix at App. 17-23.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 4, 1998. Petitioner's timely petition for rehearing was denied by the Court of Appeals on March 31, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL SENTENCING GUIDELINE PROVISION INVOLVED

United States Sentencing Guideline, Section 5K2.13 p.s. provides that if:

> ". . . the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from

> voluntary use of drugs or other intoxicants, a lower sentence may be warranted to the extent to which the reduced mental capacity contributed to the commission of the offense."

STATEMENT OF THE CASE

Petitioner was indicted on January 22, 1996, in the United States District Court for the District of Maryland, Southern Division, and charged with six counts alleging violations of 18 U.S.C. § 2252 involving receipt, transmission and possession of child pornography on his home computer. A superseding indictment was returned on May 29, 1996. It recast the six counts of the original indictment under other provisions of 18 U.S.C. § 2252.

Petitioner did not contest his factual guilt. His defense, presented at sentencing, was based on his diagnosed substantially reduced mental capacity. On July 26, 1996, Petitioner pled guilty to Count VI of the superseding indictment, charging possession of child pornography on his computer in violation of 18 U.S.C. § 2252(a)(4), and stipulated to the facts of Count III, charging transportation via his computer of child pornography in violation of 18 U.S.C. § 2252(a)(1). As part of the plea agreement, and with the District Court's consent, pursuant to Rule 11(a)(2), F.R.Crim.P., Petitioner reserved rights to appeal the District Court's denial of his motion to suppress evidence and sentencing issues.

At a three-day presentencing hearing, Petitioner presented extensive psychiatric evidence to prove that his impaired mental condition contributed to his possession of child pornography. But the District Court denied Petitioner's application under Guideline Section 5K2.13 for a downward departure because of significantly reduced mental capacity and imposed a sentence of 18 months imprisonment. The District Court immediately released Petitioner pending appeal to the Court of Appeals and to this Court.

STATEMENT OF THE FACTS

On September 13, 1995, a team of FBI agents executed a search warrant at Petitioner's house in Takoma Park, Maryland.[1] The agents seized Petitioner's computer, floppy disks, and a number of personal documents and photographs. No child or adult pornography was found except on the disks and computer.

Although the publicly stated purpose of the FBI's investigation was to apprehend persons who used the Internet to traffic in child pornography, the results in Petitioner's case hardly met that goal. The five counts in the indictment involving "shipping" or "receipt" of child pornography involved the transmission of a total of eight images. App. 58. The government offered no evidence that Petitioner was a trafficker or that he made the charged transmissions for commercial gain nor did the psychiatric evidence presented at sentencing indicate that he was a pedophile or a trafficker.

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[1] Petitioner, 51, has lived his entire life in the Silver Spring, Maryland area, except for military service (two years as an enlisted man in the United States Army from 1970 to 1972). He is divorced and has resided in Takoma Park, Maryland since 1975. Prior to this case he had no criminal record. He obtained a B.S. and a Masters of Fine Arts in Sculpture and Media from the University of Maryland. He is an artist and photographer. From 1978 through 1991, he was Director of audio-video production at the National Gallery of Art in Washington, D.C.; from 1973 through 1978 he was a video producer at the Smithsonian Institution. In 1993, he left the position of AV producer/photographer with the Peace Corps Headquarters after serving there two years. Petitioner has received numerous awards over the years, including three Emmy awards for his work at the National Gallery and for Montgomery County; he was awarded a meritorious service award by the Peace Corps. From 1989 through 1991, he was a member of the Takoma Park Cable Board. He has independently produced educational and public service videos and has been a panelist on the D.C. Commission on the Arts and Humanities. App. 35-37.

The contents of the disks and the hard drive seized from his home also demonstrate the limited and wholly private purpose for Petitioner's possession of computer images of children. The vast majority of the disk and computer contents related to spreadsheets, financial packages, taxes, word processing, calendars, other typical home computer activities, or adult sexual material which is non-criminal. There were a total of 176 images of children; these were the subject of the possession count to which Petitioner pled guilty. App. 29-32; 65-66.

1. The Sentencing Hearing

Before Petitioner was sentenced the District Court heard three days of testimony from psychiatrists and other witnesses and received documents and exhibits with respect to Petitioner's application for a downward departure based on diminished mental capacity. Petitioner's application was made pursuant to Section 5K2.13 of the Federal Sentencing Guidelines, which states:

> If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

The defense made an extensive presentation of expert psychiatric opinion in support of a downward departure: the testimony of Dr. Susan Fiester, a forensic psychiatrist, and Dr. Joel Kleinman, a neurologist, the reports of four other experts who had examined Petitioner, along with exhibits

including reports, a chart, and affidavits and letters from friends and associates of Petitioner describing his behavior and mental condition during the period when the offense to which he pled was committed.

The psychiatric testimony established that Petitioner suffered from several significant mental disorders: Tourette's Syndrome, obsessive-compulsive disorder (OCD), a major depressive disorder, and a number of neuro-psychological deficits associated with Attention Deficit Disorder (ADD). App. 40-42; 44-55. The evidence also established that these mental disorders directly caused the possession of child pornography offense to which Petitioner pled guilty. The experts concluded that because of his mental disorders, Petitioner's ability to process information and reason was significantly impaired. App. 55-57.

Dr. Kleinman, chief of neuropathology research at the National Institute of Mental Health (NIMH), is a leading expert on Tourette's Syndrome and tic disorders. App. 44-45. He testified that research has shown that Tourette's Syndrome or tic disorder, from which Petitioner suffered, often causes or is associated with obsessive compulsive disorder (OCD) and attention deficit disorder (ADD). App. 45-50. Dr. Kleinman determined that Petitioner had suffered from Tourette's Syndrome for many years, dating back to his early teens, and that his Tourette's Syndrome made it more likely that he would suffer depression because the areas of the brain affected by these neurological disorders also predisposed people to depression. App. 50-57.

Dr. Kleinman concluded that Petitioner's depression exacerbated his Tourette's-associated OCD, and that in combination these three disorders contributed to commission of the crime to which he had pled guilty and that his neurologic disorders, OCD, major depression and had impaired Petitioner's ability to process information and to reason, and caused him to collect and transmit pornographic pictures. App. 50-57. He also noted that Petitioner did not

fully appreciate the wrongfulness of collecting or sending child pornography via computer. App. 56-57.

2. The Sentencing

At sentencing, Petitioner contended that the District Court should depart downward from his Guideline sentencing level because of his volitional mental disorders, Tourette's Syndrome, OCD, major depression and ADD. He argued that, under Section 5K2.13 of the Guidelines, the standard for granting a downward departure was whether any mental disorder - - including volitional disorders such as Tourette's, OCD, depression and ADD - - contributed to the offense of conviction. This position was based on the plain language of Section 5K2.13 and the Fourth Circuit's decision in United States v. Glick, 946 F.2d 335 (4th Cir. 1990), which imposed no restriction on qualifying mental disorders. App. 59-62.

The Government responded that the District Court was bound to follow the restrictive standard established by the Fourth Circuit in its later decisions in United States v. Goossens, 84 F.3d 697 (4th Cir. 1996) and United States v. Withers, 100 F.3d 1142 (4th Cir. 1996), cert. denied, 117 S.Ct. 1282 (1997), which permitted a departure only if: "[a significantly impaired mental condition] affected the defendant's ability to process information or to reason ..." App. at 62-64.

The District Court followed the Goossens-Withers standard. Although acknowledging that in a given case depression and obsessive-compulsive disorder (OCD) could qualify as mental disorders supporting a downward departure, the District Court refused to grant a departure in Petitioner's case. Guided by Goossens and Withers, it stated:

> The issue is, however, what conclusions the Court reaches on the factual

record as to whether the defendant was suffering from a significantly – a significantly reduced mental capacity and whether, if he was, the reduced mental capacity contributed to the commission of the offense.

The most recent Fourth Circuit case is the Withers case decided only on November 19, 1996. The Court points out to all of that that the guidelines instruct that mental and emotional condition are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

In order to qualify for a departure under this section, a defendant must be suffering from something greater than emotional problems or hardship. A defendant must demonstrate that his or her significantly reduced mental capacity bears a causal relationship to the crime. This causal-connection must consist of more than an emotional weakness that leaves one open to suggestion.

Rather, in order to qualify for a diminished capacity departure, a defendant must show an inability to process information or to reason.

Like Mr. Adelman [Petitioner's counsel], I don't think that there is a requirement that the defendant show a total inability or a told [sic] lack of ability to process information or to reason. But I do think, and perhaps it is immaterial, that what

> we're really talking about is an impairment in an ability to process information or to reason. The mental capacity must in some fashion contribute to the commission of the offense.
>
> And I think under what I've been asked to consider here, there is – there really is no room for debate as to whether contribution means something broader than impairs an ability to process information or to reason, because I think the testimony that I have heard from the defense witnesses goes to that type of contribution to the offense.
>
> And that is that, as Dr. Fiester articulated, that Mr. Sassani, [Petitioner] was not able to think through the consequences of the activity. And, as we've heard today reiterated, Dr. Kleinman opined that he could not fully appreciate the implications of what he was doing. App. 18-19.[2]

The District Court concluded, inter alia, that Petitioner suffered from bereavement rather than OCD or depression, and in concert with Withers, observed that Petitioner suffered from no more than an emotional weakness that left him open to suggestion and opportunity to knowingly violate the law. App. 21. Acknowledging that such a disorder can affect the commission of crime, the Court could not find that bereavement was so disabling to significantly reduce mental capacity. App. 19-21.

Though it declined to grant a downward departure, the District Court did impose the minimum sentence possible under Guideline Level 15 (18 months), noting that giving the

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2 The full text of the District Court's opinion is set out at App. 17-23.

lowest sentence in the guideline range, "is perhaps where I would take into account the information that I have had with regard to the defendant's acknowledgement now and realization that there is good reason for making possession of child pornography illegal." App. 22.

Because of Goossens and Withers the District Judge's focus at Petitioner's sentencing was on cognitive impairment. Even though Petitioner presented substantial evidence of volitional disorders, the District Court stated that cognition was the exclusive test. See App. 18-20. This effectively precluded full meaningful consideration of Petitioner's diagnosed volitional disorders. Applying the restrictive cognitive standard, the District Court concluded that Petitioner was not suffering from a major depressive disorder, OCD or ADD. App. 19-22.

Had the District Court considered Petitioner's psychiatric evidence under a standard for downward departure that allowed for full consideration of his Tourette's Syndrome, OCD, major depression and ADD, these conclusions, and Petitioner's sentence, might well have been different.

THE COURT OF APPEALS' DECISION

In the Court of Appeals Petitioner argued that the Goossens-Withers restriction of downward departure under Section 5K2.13 to cognitive disorders was an unwarranted reading of Section 5K2.13, and that that section did not restrict the type of mental disorder that could support a downward departure based on diminished capacity. He also contended that the volitional disorders from which he suffered, Tourette's Syndrome, obsessive-compulsive disorder (OCD), a major depressive disorder, and a number of neuro-psychological defects associated with ADD, could support a downward departure. Petitioner also argued that the Fourth Circuit's interpretation was unnecessary since the plain language contained no exceptions and required no

judicial gloss, pointing out that that is the view of three other Circuits, United States v. McBroom, 124 F.3d 533 (3d Cir. 1996), United States v. Lewinson, 988 F.2d 1005 (9th Cir. 1993), and United States v. Herbert, 902 F. Supp. 827 (N.D. Ill. 1995). McBroom, a most recent and major contrary decision to Goossens-Withers, involved a very similar situation to Petitioner's case and held authoritatively that a downward departure may be granted under Section 5K2.13 for volitional mental disorders as well as for cognitive mental disorders. Although McBroom was brought to the attention of the Fourth Circuit by Petitioner three and one half months prior to the oral argument in this case[3], and was also brought to the Court's attention during oral argument on December 5, 1997, there is no mention of the McBroom decision in the Court of Appeals' opinion. See App. 14-16.

In affirming the District Court, the Court of Appeals, citing United States v. Glick, supra, in which it first discussed downward departure based on diminished capacity, stated: "Thus, the Glick standard for downward departure under Section 5K2.13 p.s., as explicated in Goossens and Withers, remains the law of this Circuit." App. at 16. It noted that Goossens, "requires a defendant's mental capacity not simply be partially diminished, but that it be so diminished as to render the defendant incapable of processing information or reasoning" and that Withers "requires that the diminished mental capacity actively contribute to the behavior, such as by rendering the defendant incapable of reasoning". App. at 16.

The Fourth Circuit thus unequivocally affirmed its restriction of downward departures to cognitive disorders.

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[3] On September 9, 1997, Petitioner's counsel wrote a letter to the Fourth Circuit, pursuant to the local rules of that Court and F.R.A.P. Rule 28(j) in which he drew the Court Appeals' attention to the McBroom decision as supplemental authority in support of Petitioner's contentions on diminished capacity and downward departure. App. 25-26.

In the Court of Appeals, Petitioner squarely presented the issue of whether downward departures are restricted to cognitive disorders or extend to volitional disorders. However the Court of Appeals sidestepped this question by instead discussing the general standard for departure under Section 5K2.13 (See App. 15-16), which was not the issue petitioner raised.[4]

REASONS WHY THE WRIT SHOULD BE GRANTED

INTRODUCTION

The universe of mental disorders relevant to sentencing includes volitional incapacity and cognitive incapacity. United States v. McBroom, supra, 124 F.3d at 544-550; United States v. Cantu, 12 F.3d 1506, 1512-1513 (9th Cir. 1993). As aptly stated by Chief Judge Posner: under the Sentencing guidelines, "the term 'mental capacity' refers to action as well as to understanding. The mind is an organ of volition as well as of reflection. A person who knows what he is doing and that it is wrong but can't control himself is deficient in mental capacity". United States v. Pullen, 89 F.3d 368, 370-371 (7th Cir. 1996), cert. denied, 117 S.Ct. 1706 (1997).

Under this standard Petitioner qualifies for a downward departure under Section 5K2.13. According to Petitioner's experts, who included a leading forensic psychiatrist and the head of neuropathologic research at the National Institute for Mental Health, Tourette's Syndrome, and the OCD, depression and ADD associated with that possibly genetic disorder, impaired Petitioner's ability to process information and to reason, and his OCD caused him to possess child pornography.

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[4] Though Glick contradicts Goossens and Withers, the Court of Appeals attempted, unpersuasively, to harmonize these three decisions. See App. at 15-16.

Besides these mental travails Petitioner was disadvantaged by a split in the Circuits. In the Third, Seventh and Ninth Circuits, Petitioner's mental disorders would have entitled him to consideration for a downward departure from his guideline sentencing range. However, Petitioner was sentenced in the Fourth Circuit, which, like the Sixth and the D.C. Circuits, does not recognize such volitional disorders of any kind or severity as among those mental conditions that warrant a downward departure.

This Petition seeks review of the Fourth Circuit's decision which confined downward departures under Guideline Section 5K2.13 to impaired cognition, to the exclusion of volitional incapacity. With a full record developed in a three-day evidentiary hearing in the District Court, Petitioner's case is an appropriate vehicle for the Court to review this issue and to establish a uniform interpretation of Section 5K2.13 and one that comports with modern psychiatry. See McBroom, supra, 124 F.3d at 549, esp. n. 16.

There are several persuasive reasons why the Court should grant the writ. First, the issue raised by Petitioner has generated a clear and irreconcilable split in the Circuits. In the last seven years, six Circuits have addressed the issue and have divided down the middle on how it should be resolved. As a result of the Circuit split, the very type of sentencing disparity that the Sentencing Guidelines were designed to eradicate has been spawned. Action of this Court is necessary to restore uniformity in this very important area.

Second, the issue raised by Petitioner directly affects a large and recurring class of persons, a class comprised of mentally disordered offenders in federal courts. Until recently, the disposition of mentally ill offenders was decided primarily at trial. Now it is almost exclusively decided by federal judges at sentencing. Section 5K2.13 of the Guidelines is the vehicle for presenting evidence of reduced mental capacity at sentencing. Because the number of mentally disordered offenders facing sentencing has

increased, the issue raised by petitioner is one of pervasive and continuing importance for all of the federal trial courts.

Third, the issue was incorrectly decided in Petitioner's case by the Fourth Circuit, and was correctly decided in the opinion of the Third Circuit in McBroom. The Court should grant the writ to provide proper guidance to District Courts by adopting analysis and conclusions of McBroom. Petitioner's arguments have been vindicated by the Sentencing Commission itself which has proposed to amend Section 5K2.13, in specific accord with McBroom, to affirmatively state that downward departures may be based on volitional impairments.

Fourth, the decisions of the Fourth, D.C. and Sixth Circuits in constricting the scope of Section 5K2.13 without any basis in the language of that provision, amounts to judicial amendment of the guidelines in violation of the Separation of Powers doctrine and federal jurisprudence. The Sentencing Guidelines cannot be amended by judicial fiat, but only by Congress or the Sentencing Commission. By granting the writ in Petitioner's case this Court can correct this mistake in jurisprudence embodied in the Fourth Circuit's decision.

We explain in detail the reasons for granting the petition as follows.

I. THE CIRCUITS HAVE SPLIT ON THE INTERPRETATION OF SECTION 5K2.13. THIS COURT SHOULD GRANT THE WRIT TO ESTABLISH UNIFORMITY ON THIS VITAL SENTENCING ISSUE

As noted, at sentencing the universe of relevant mental disorders includes volitional incapacity and cognitive incapacity. In the last seven years, six Circuits have addressed the question of whether Section 5K2.13 permits a downward departure for volitional disorders or whether such departures are allowed only for cognitive mental

impairments. Three Circuits have held that Section 5K2.13 departures are confined to cognitive impairments. Two Circuits have held, and judges in a third Circuit have indicted in dicta, that volitional disorders should be covered as well. The split among these Circuits is clear, and apparently irreconcilable.

The Circuit split has created the very disparity in sentencing that the Sentencing Guidelines were designed to eradicate. Thus, convicted defendants in the Third, Ninth and Seventh Circuits can obtain a downward departure on the basis of having suffered from volitional or cognitive disorders. But defendants in the Fourth, Sixth, and D.C. Circuits are denied departure for volitional disorders and can obtain a downward departure only if they are able to show significant impairment of cognitive functions to the extent that they are unable to process information or to reason. By granting the writ, this Court can restore the uniformity in sentencing throughout the federal system that is a fundamental goal of the Federal Sentencing Guidelines. See Mistretta v. United States, 488 U.S. 361, 363-368 (1989).

The Third and Ninth Circuits have held, and opinions in the Seventh Circuit have indicated, that a downward departure may be granted under Section 5K2.13 if the defendant suffers from volitional or emotional mental disorders as well as cognitive mental disorders: Third Circuit: United States v. McBroom, supra, 124 F.3d at 544-511; Ninth Circuit: United States v. Cantu, supra, 12 F.3d at 1512-1513; United States v. Lewinson, supra, 988 F.2d at 1106; Seventh Circuit: United States v. Pullen, supra, 89 F.3d at 370-371 (C.J. Posner) (dictum); see also, United States v. Herbert, supra, 902 F. Supp. at 829.

In specifics, the opinions of the Third, Ninth and Seventh Circuits are as follows: In McBroom, the Third Circuit, agreeing with Chief Judge Posner's reasoning in Pullen, held that Section 5K2.13 contains a volitional as well as cognitive component and that it applies to a defendant who is unable to control his conduct even though cognitive

functions may be unimpaired: "We conclude that the Sentencing Commission intended to include those whose cognitive impairments and those with volitional impairments within the definition of 'reduced mental capacity' . . . A person may be suffering from a 'reduced mental capacity' for the purposes of Section 5K2.13 if either: (1) a person is unable to absorb information in the usual way or to exercise the power of reason; or (2) the person knows what he is doing and that it is wrong but cannot control his behavior or conform it to the law." 124 F.3d at 548. (emphasis in original). In Cantu, the Ninth Circuit held that Section 5K2.13 applies to volitional disorders. 12 F.3d at 1512. It stated that: " 'reduced mental capacity' then, comprehends both organic dysfunction and behavioral disturbances that impair the formation of reasoned judgments. Both make a defendant eligible for departure under § 5K2.13." 12 F.3d at 1513. It also stated that: "The focus of the guideline provision [Section 5K2.13] is reduced mental capacity, not the cause - organic, behavioral, or both - - of the reduction." 12 F.3d at 1512 (emphasis in original).

In Pullen, the Seventh Circuit, through Chief Judge Posner, in dicta rejected a claim that diminished mental capacity refers only to cognitive factors and pointed out that under the guidelines, "the term 'mental capacity' refers to action as well as to understanding. The mind is an organ of volition as well as reflection. A person who knows what he is doing and that it is wrong but cannot control himself is deficient in mental capacity." 89 F.3d 370-371.

By contrast, three other Circuits, the Fourth, Sixth and the District of Columbia Circuits, have held that only if the defendant's cognitive ability to reason and to process information is impaired can the defendant be eligible for a downward departure under Section 5K2.13: Fourth Circuit: Besides Petitioner's case, United States v. Sassani , supra, United States v. Withers, supra, 100 F.3d at 1148; United States v. Goossens, supra, 84 F.3d at 700-702; D.C. Circuit: United States v. Edwards, 98 F.3d 1364, 1367 (D.C. Cir.

1996); see, United States v. Leandre, 132 F.3d 796, 806-807 (D.C. Cir. 1998); Sixth Circuit: United States v. Hamilton, 949 F.2d 190, 193 (6th Cir. 1991) (per curiam).

In specifics, the opinions of the Fourth, Sixth, and D.C. Circuits are as follows. As the Court of Appeals explained in Petitioner's case, Goossens' interpretation of section 5K2.13" . . . requires that the mental capacity not simply be partially diminished, but that it be so diminished as to render the defendant incapable of processing information or reasoning." App. at 15. As Goossens itself put it: "the defendant must have been unable to process information or to reason" and so dysthymic and anxiety mental disorders would not justify a downward departure. 84 F.3d at 701. And in Withers, the other lynchpin of the decision in Petitioner's case, the Fourth Circuit rejected depression as grounds for a downward departure because there was no evidence that it "affected [the defendant's] ability to reason or process information" 100 F.3d at 1148. The opinion in Petitioner's case states that the restrictive standards of Goossens and Withers remains the law in the Fourth Circuit. App. 16.

In Hamilton, the Sixth Circuit rejected a downward departure claim because the defendant was "able to absorb information in the usual way and exercise the power of reason." 949 F.2d at 193. Similarly, in Edwards the D.C. Circuit rejected the argument that "mental capacity" had a meaning apart from intellectual capacity and held that psychological or behavioral disorders could not serve as a basis for departure based on reduced mental capacity absent an "accompanying inability to reason." 98 F.3d at 1367.[5]

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[5] Other Circuits have not directly addressed the cognition-volition question regarding Section 5K2.13, but there are suggestions in decisions of the Tenth and Eleventh Circuits that touch on the point. The Tenth Circuit in United States v. Webb, 49 F.3d 636, 639 (10th Cir. 1995) suggests that a history of dysthymia, post-traumatic stress disorder, panic disorder, and personality disorder with paranoid features would not be sufficient to support a downward departure. And the Eleventh Circuit in

The Circuit split is deep. On the one hand, the Fourth, Sixth, and D.C. Circuits have reiterated in several decisions their view that Section 5K2.13 is restricted to cognitive disorders: Fourth Circuit: United States v. Sassani, supra; United States v. Goossens, supra; United States v. Withers; Sixth Circuit: United States v. Hamilton, supra; United States v. Johnson, 979 F.2d 396, 407 (6th Cir. 1992); United States v. Barajas-Nunez, 91 F.3d 826, 831 (6th Cir. 1996); D.C. Circuit: United States v. Edwards, supra; United States v. Leandre, 132 F.3d 796, 806-807 (D.C. Cir. 1998) (based on Edwards, "reduced mental capacity under § 5K2.13 "refers to a defendant's ability to reason.")

On the other hand, the Ninth Circuit and the Seventh Circuits have reiterated that Section 5K2.13 admits of no qualifications and that emotional and volitional disorders are covered as well. Seventh Circuit: Besides Pullen, a District Court opinion, United States v. Herbert, supra, rejected the government's argument that downward departure is allowed only for psychiatric problems that "impair an individual's ability to take in and process information as opposed to an ability to act properly based on that information", holding that . . . "nothing in the Guidelines supports the distinction advanced by the Government." 902 F. Supp. at 829-830. In his dissent in United States v. Poff, 926 F.2d 588, 595 (7th Cir. 1991) (en banc) Judge Easterbrook pointed out that volitional impairment should be considered in sentencing, noting that traditionally lower sentences were meted out to persons, "who, although not technically insane, are not in full command of their actions. . . Persons who find it difficult to control their conduct do not - - considerations of dangerousness to one side - - deserve as much punishment as

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United States v. Philibert, 947 F.2d 1467, 1471-1472 (11th Cir. 1991) indicated that evidence that the defendant suffered from a "severe mental illness [apparently paranoid schizophrenia] including paranoid delusions" gave the trial court discretionary authority to depart downward under Section 5K2.13.

those who act maliciously or for gain." 926 F.2d at 595. Significantly, both Chief Judge Posner's views in Pullen and Judge Easterbrook's statements in Poff were relied on by the Third Circuit in McBroom. See, 124 F.3d at 546. Ninth Circuit: United States v. Cantu, supra; United States v. Lewinson, supra, 988 F.2d at 1006 (Section 5K2.13 has no qualifications: ". . . the plain language of [Section 5K2.13] authorizes departure on a showing of significantly reduced mental capacity without qualification as to the nature or cause of the reduced capacity (except with respect to voluntary drug use)" (emphasis added); United States v. Doering, 909 F.2d 392, 394 (9th Cir. 1990) ("a defendant's "mental and emotional condition is relevant to a determination under Section 5K2.13").

The Circuit split is pointed. In McBroom the Third Circuit expressly disagreed with the Fourth Circuit's decisions in Goossens and Withers and with the decisions of the Sixth Circuit in Hamilton and Johnson. 124 F.3d at 547. After discussing these four decisions, the Third Circuit pointedly set out its different view, noting that, "to the extent that some of these courts have purposely limited Section 5K2.13 to its cognitive prong, however, we cannot agree to such a narrow reading of the guidelines." 124 F.3d at 547.[6]

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[6] In terms of the judges themselves, fourteen active Circuit judges in six Circuits have supported the restrictive view of Section 5K2.13 and eleven other judges have supported the broader interpretation. Four active judges of the Fourth Circuit, six active judges of the D.C. Circuit and four active judges of the Sixth Circuit have voted in support of the restrictive view of Section 5K2.13, while three active judges of the Third Circuit and two active judges of the Ninth Circuit, have voted in support of the broad interpretation of Section 5K2.13 and six active Seventh Circuit Judges have voted to support the views of Chief Judge Posner in Pullen and Judge Easterbrook in his dissent in Poff.

II. THE INTERPRETATION OF SECTION 5K2.13 AFFECTS A LARGE AND RECURRING CLASS OF PERSONS, MENTALLY DISORDERED FEDERAL CRIMINAL OFFENDERS. THIS CLASS IS GROWING BECAUSE RECENT LEGISLATION HAS SHIFTED RESOLUTION OF MENTAL DISORDER ISSUES TO THE SENTENCING STAGE OF FEDERAL CRIMINAL PROCEEDINGS.

The issue raised by Petitioner is not simply a mechanical question of interpretation of a provision of a Federal Sentencing Guidelines. The correct interpretation of Section 5K2.13 directly affects a large and recurring class of persons - - mentally disordered criminal offenders. It also directly implicates one of the classic dilemmas of the criminal law: the proper disposition of the mentally disordered offender. This question is one with which common law courts have struggled since the Middle Ages.[7]

Recent legislation has shifted disposition of the mentally disordered offender from the jury's determination at trial to the judge's evaluation at sentencing. This change has been effected by combined impact of the Insanity Defense Reform Act of 1984 ("IDRA"), Pub. L. No. 98-473, Title II, § 402(a), 98 Stat. 2057 § 20 (1984), recodified at 18 U.S.C. § 17, and the Federal Sentencing Guidelines promulgated by the U.S. Sentencing Commission. 18 U.S.C. §§ 3551-3673; 28 U.S.C. §§ 991-998.

Until 1984, the federal courts dealt with mentally disordered offenders principally through the insanity defense - - the litigation of the defendant's mental condition before a trial jury. The IDRA, enacted in 1984 in reaction to the verdict in the John Hinckley case in 1982, severely restricted the scope of the insanity defense and purported to eliminate

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[7] This history is well recounted in Bonnie, Coughlin, Jeffries & Low, Criminal Law, (Foundation Press, 1997), pp. 445-456.

the related defense of diminished capacity in the federal courts.[8] The effect of the IDRA's restriction of the insanity defense and the elimination of diminished capacity was to shift consideration of the defendant's mental condition to the sentencing phase of a criminal case, and away from the trial phase. This shift was given significant momentum by the Federal Sentencing Guidelines, effective in 1987, which, in Section 5K2.13, allowed for downward departure from the Sentencing Guideline range for defendants with significantly reduced mental capacity.

The result of the IDRA reforms has been a sharp decrease in successful trial defenses of insanity and diminished capacity.[9] Consequently, mentally disordered defendants who previously had avoided conviction and sentencing[10] by presenting successful defenses of insanity or diminished capacity, are now convicted and must be sentenced. It also means that prosecutors are more inclined to file charges against mentally disordered offenders since

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8 The IDRA effected the restriction on the insanity defense by: limiting the insanity defense to the defendant's ability to appreciate wrongfulness, 18 U.S.C. § 17(a); mandating that only "severe" mental disorders can support an insanity defense, 18 U.S.C. § 17(a); placing the burden of proving insanity on the defendant, 18 U.S.C. § 17(b); and restricting expert opinion on mental condition, Rule 704(b), F.R.E.. The IDRA also purported to abolish the defense of "diminished capacity". See 18 U.S.C. § 17(a) (except for insanity as defined in §17(a), "[m]ental disease or defect does not otherwise constitute a defense") and S. Rep. No. 98-225, 98th Cong., 2d Sess. 229 (1984), reprinted in U.S. Code. Cong. Ad. News 2182, 3411.

9 For instance, the Administration Office of The U.S. Courts' data shows that in the twelve month period ending March 31, 1998, of 65,446 criminal cases closed in Federal District Courts, only 15 involved a finding of not guilty by reason of insanity. Administrative Office Of The U.S. Courts, "Federal Judicial Caseload Statistics", Table H-13 (forthcoming, 1998).

10 If a defense of insanity is successful the defendant is not sentenced but is committed for treatment. See 18 U.S.C. § 4243.

the trial defenses of insanity and diminished capacity are less likely to be barriers to conviction. As a result, the number of mentally disordered offenders sentenced in federal courts has increased.

The Guidelines apply to all federal criminal sentences and Section 5K2.13 is the sole vehicle for presenting evidence of significantly reduced mental capacity to obtain a downward departure. Thus, the issue raised by Petitioner of whether a departure under Section 5K2.13 is restricted to certain cognitive mental disorders or whether it also covers volitional disorders - - one on which the Circuits are now sharply split - - is one of pervasive and continuing importance in all federal trial courts.

III. THE COURT OF APPEALS' INTERPRETATION OF SECTION 5K2.13 IN PETITIONER'S CASE WAS ERRONEOUS AND DISREGARDED A CLEARLY CORRECT INTERPRETATION BY THE THIRD CIRCUIT WHICH SHOULD BE ADOPTED BY THIS COURT. IT IS ALSO CONTRADICTED BY A PROPOSED AMENDMENT TO SECTION 5K2.13.

Section 5K2.13 states in clear and unequivocal terms that a sentencing court may depart if it finds that the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants. There is no qualification in the plain terms of Section 5K2.13 as to the type of mental disorder that can support a diminished capacity finding. Nor does it require that the mental disorder must affect the defendant's ability to process information or to reason. Section 5K2.13 has no restrictions. Thus, both volitional and cognitive impairments are covered.

The mental condition that supports a downward departure under Section 5K2.13 is not an "extinguished" mental capacity, but only a "diminished" mental capacity.

To the extent they suggest otherwise, Goossens and Withers cannot be credited, for if these decisions mean that a defendant must have no ability to process information or to reason, there then would be no departures under Section 5K2.13 because anyone who was totally "unable to reason or process information" would be in a vegetative state and incompetent to stand trial. And if such a person were found competent, he surely would be found not guilty by reason of insanity and, as an insanity acquittee, would have no need for a downward departure.

In this case, the District Court felt bound by the Goossens – Withers standard. As a result, the extensive psychiatric evidence presented by Petitioner establishing the volitional disorders of Tourette's Syndrome-induced OCD, major depression, and ADD, was effectively ignored as having no legal significance under the legal standard that guided the District Court. That the Goossens – Withers standard restricts downward departures without warrant was conclusively demonstrated by the Third Circuit in McBroom. 124 F.3d at 547. Petitioner respectfully submits that this Court should grant the writ and follow the reasoning in McBroom.

There are many factual and legal similarities between Petitioner's case and McBroom. Petitioner and Mr. McBroom both: pled guilty to a single count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4); used personal computers to receive images of child pornography and then stored them in image files; progressively became obsessed with child pornography; had a guideline level that calculated out to a possible sentence of 15 to 21 months; and were both diagnosed with a compulsive mental disorder.[11]

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[11] The District Court found that Mr. McBroom suffered from bipolar disorder, manic depression, and multiple disorders of impulse control. 124 F.3d at 540. But the District Court in Petitioner's case refused to find that he suffered from significant depression, OCD or ADD. See, App. 19-22.

The District Court in McBroom denied a downward departure, citing the Sixth Circuit's opinion in Johnson, which guided the Fourth Circuit in Goossens and Withers. Echoing the District Court in Petitioner's case, it noted that "courts have found that a downward departure is unavailable where there was 'no indication that [the defendant] was unable to process information or to reason'," and that, "a defendant able to absorb information in the usual way and to exercise the power of reason is not suffering from the significantly reduced mental capacity under U.S.S.G. § 5K2.13." 124 F.3d at 540. The Third Circuit resoundingly reversed this line of reasoning.

McBroom makes clear that the correct interpretation of Section 5K2.13 is that it is not limited to cognitive impairment:

> "When the Sentencing Commission promulgated policy statement 5K2.13 it did not define the term 'significantly reduced mental capacity'. We do not believe however, that the Commission intended to preclude District Courts from considering volitional impairments during the sentencing phase in the same manner in which Congress precluded consideration of volitional impairments as an affirmative insanity defense." 124 F.3d at 546[12]

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12 Although the IDRA does not permit a defendant to present volitional mental disorder evidence to support an insanity defense, McBroom noted there is an important difference when sentencing is involved: "In sharp contrast, when a court considers the sentencing of a convicted defendant, guideline section 5K2.13 may apply once the accused's reduced mental capacity "contributed to the commission of the offense – without regard to how the reduced mental capacity so contributed." 124 F.3d at 546.

In this case, Petitioner presented extensive psychiatric testimony and documentary evidence to show impairment of his ability to control his conduct due to reduced mental capacity based on volitional disorders, Tourette's-induced OCD, major depression, and ADD. These diagnosed disorders were effectively ignored by the District Court under the Goossens – Withers standard. Had McBroom's correct analysis applied, all of this evidence could have been considered as a basis for a downward departure because, as the Third Circuit stated ". . . if an individual is capable of appreciating the nature, quality, and wrongfulness of certain acts, but is unable to control their conduct due to reduced mental capacity, Section 5K2.13 may also apply. Thus, Section 5K2.13 retains both a "cognitive prong" and a "volitional prong"." 124 F.3d at 548. The Third Circuit concluded: "Justice demands that sentencing courts be able to consider an offender's capacity to control his behavior before determining an appropriate sentence. Section 5K2.13 provides courts the ability to do just that." 124 F.3d at 546. In this case Petitioner was denied what justice demanded.

Petitioner was entitled to have his sentencing based on the same interpretation of Section 5K2.13 as McBroom allows. He submits that had that happened, the District Court in his case necessarily would have viewed his evidence, particularly the testimony of his psychiatric experts, in a different light.[13] It is respectfully submitted that this Court

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[13] For example, in McBroom the Third Circuit noted that background or causative information is highly relevant to determine whether a volitional impairment can support a downward departure. "It would be helpful in the sentencing court for McBroom's proffered experts, who report that McBroom suffers from a compulsion to be a child pornographer, to explain how that compulsion may have originated." 124 F.3d at 551. Petitioner sought to do just that: Dr. Kleinman explained that Petitioner's Tourette's Syndrome, was causally related to OCD, which in turn, coupled with his depression, caused him to possess child pornography. App. 45-57. But under the Goossens – Withers strictures, this incisive expert analysis was for naught.

should adopt the McBroom analysis in Petitioner's case so that he can benefit from the correct interpretation of Section 5K2.13.

Petitioner's position has been vindicated by the Sentencing Commission itself. On May 1, 1998, the Sentencing Commission unanimously approved a proposed amendment to Section 5K2.13. This amendment directly adopts the holding in McBroom, and affirmatively states that Section 5K2.13's definition of "significantly reduced mental capacity" includes volitional impairments as well as cognitive impairments. The amendment, its policy statement, and the Reason for the Amendment are set out at App. 27-28.

The amendment of Section 5K2.13, p.s. in pertinent part states that: "A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity." The Application Note to the amendment states:

> For purposes of this policy statement –
>
> "Significantly reduced mental capacity" means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful. App. 27.

And the Reason for the Amendment provided by the Sentencing Commission includes the following:

> The amendment [to Section 5K2.13] also adds an application note that defines "significantly reduced mental capacity" in accord with the decision in United States v. McBroom, 124 F.3d 533 (3d Cir. 1997). The

> McBroom court concluded that "significantly reduced mental capacity" included both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of "significantly reduced mental capacity". App. 27-28.

The amendment will be effective on November 1, 1998, unless modified or rejected by Congress.

The proposed amendment makes clear that there now can be no serious argument that Section 5K2.13 does not include volitional impairments, that is, those involving an inability to control behavior that the person knows is wrongful. This is the proper reading of §5K2.13 and this is the analysis of section 5K2.13 by McBroom, and the position consistently maintained by Petitioner in the District Court, in the Court of Appeals, and in this Petition.[14]

IV. THE COURT OF APPEALS' DECISION CONSTITUTES AN UNAUTHORIZED JUDICIAL AMENDMENT TO THE GUIDELINES.

The Court of Appeals' decision is also mistaken in light of the jurisprudence that has evolved with respect to the Guidelines.

Section 5K2.13 is clear and unequivocal: if the defendant was suffering from a "significantly reduced mental

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[14] Because Congress has until November 1, 1998 to modify or reject the amendment, see 28 U.S.C. § 994(p), and could do so, Petitioner has filed a motion with this Court, requesting that the Court defer action on the Petition until after November 1, 1998.

capacity" he is entitled to be considered for a downward departure. There are no qualifiers to "significantly reduced mental capacity". It does not in its terms refer to "cognitive impairments" or to impairments that "render the defendant incapable of processing information or reasoning." There is no basis from the face of this guideline policy statement to limit it to cognitive impairment as the Court of Appeals did in Petitioner's case and in Goossens and Withers, which guided the District Court in imposing his sentence. The rulings of the Fourth Circuit, and the Sixth and D.C. Circuits as well, in restricting Section 5K2.13 to cognition, amount to a judicial amendment of a guideline provision.

The Fourth Circuit itself has expressed the view that a court cannot effectively rewrite a Guideline since that function falls within the domains of the Sentencing Commission and the Congress. United States v. Jones, 18 F.3d 1145, 1149-1150 (4th Cir. 1994); cf., United States v. Lopez, 938 F.2d 1293, 296-1298 (D.C. Cir. 1991) (Sentencing Commission rulemaking is not subject to judicial review). The point, grounded on the doctrine of Separation of Powers, was made in Jones in the context of an assertion that a Guideline was at odds with the Sentencing Reform Act's legislative history.

There is no legislative history with respect to Section 5K2.13. But, consistent with the rationale of Jones, there can be no basis to impose a gloss on Section 5K2.13 that limits it to cognitive disorders. The teaching of Jones, which the Fourth Circuit elected to ignore in Petitioner's case, is that judicial amendment to a guideline such as Section 5K2.13 is unwarranted. Such tasks are properly left with the U.S. Sentencing Commissioner or the Congress. 28 U.S.C. §§ 994(o) and (p), establish that the Federal Sentencing Commission has the authority to revise the guidelines and submit amendments to Congress.

The Guidelines, "having the force and effect of law, ought to be construed as if they were a statute, giving the words used their common meaning, absent a clearly

expressed manifestation of contrary intent." United States v. Kirvan, 86 F.3d 309, 311 (2d Cir. 1996), citing United States v. Turkette, 452 U.S. 576, 580 (1981); United States v. Goldbaum, 879 F.2d 811, 813 (10th Cir. 1989). And, as Chief Judge Posner has explained, merely because a provision of the guidelines is labeled a "policy statement", as is true for §5K2.13, does not make this provision any less authoritative. United States v. Anderson, 72 F.3d 562, 564 (7th Cir. 1995).

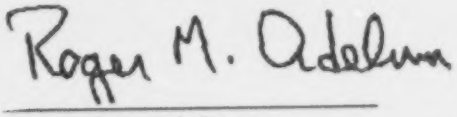
The doctrines of statutory construction ordain that, as with a statute, a court may not amend the terms of a guideline provision, or create new exceptions to it. Kirvan is an example of judicial resistance to rewriting the guidelines -- there rejecting an invitation to add an additional exception to the term "firearm" as defined in the weapons possession guideline. See, 86 F.3d at 311-315.

This basic principal of statutory construction has thus been breached by the Fourth, Sixth, and D.C. Circuits decisions that have limited Section 5K2.13 to cognitive impairments. Misapplication of an important jurisprudential principal, and failure to observe the separation of powers doctrine that underlies it, provides still further reason why this Court should grant the writ and make clear that judicial amendments to the guidelines, such as occurred in Petitioner's case, should not be permitted.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,



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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-4011

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.
MICHAEL BRUCE SASSANI,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Deborah K. Chasanow, District Judge.
(CR-96-12DKC)

Argued: December 5, 1997
Decided: March 4, 1998
Entered: March 4, 1998

Before NIEMEYER, Circuit Judge, BUTZNER, Senior Circuit Judge, and MICHAEL, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Roger Mark Adelman, KIRKPATRICK & LOCKHART, L.L.P., Washington, D.C., for Appellant. Sandra Wilkinson, Assistant United States Attorney, Greenbelt, Maryland, for Appellee. **ON BRIEF:** Lynne A.

Battaglia, United States Attorney, Beth P. Gesner, Assistant United States Attorney, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Background

In 1994, the Federal Bureau of Investigation was notified by an America OnLine[1] customer and police officer, Richard Ivey, of receipt of unsolicited pornographic graphic[2] image files from another America OnLine subscriber by the name of "BIG MIKE 8." In September 1994, a special agent of the FBI, acting in an undercover capacity, engaged in electronic conversations with BIG MIKE 8, in connection with which BIG MIKE 8 transmitted, via America OnLine, at least five sexually explicit graphic images of persons apparently under the age of eighteen. In October 1994, a cooperating witness also received from BIG MIKE 8 an electronically transmitted message and sexually explicit graphic image of two persons apparently under the age of eighteen. Further investigation revealed the subscriber "BIG MIKE 8" to be registered as Michael Bruce Sassani. In March 1995, four more sexually explicit graphic images, including pictures of individuals apparently under the age of eighteen, were

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[1] America OnLine is a commercial computer service and online access provider.

[2] The court uses the adjective"graphic" only to identify the electronic files as pictorial representations.

electronically transmitted to undercover agents by BIG MIKE 8.

On 13 September 1995, Federal Bureau of Investigation (FBI) agents executed a search warrant at the home of Michael Sassani in Maryland. During the six-hour search, the agents seized Mr. Sassani's personal computer, 382 floppy disks, numerous personal documents and photographs, and a small quantity of narcotics.[3] After extensive review of the hard drive of the computer and the 382 floppy diskettes seized, the FBI determined that the drive and the disks contained a total of 176 visual depictions of minors engaged in sexually explicit conduct.[4] The agents concluded that at least ten of the pictures portrayed individuals under twelve years of age.

On January 22, 1996, defendant was indicted on six counts for violations of the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. 2251-2260 (West 1997). On May 20, 1996, the district court denied all of the defendant's pretrial motions, which included motions to suppress evidence, for an evidentiary hearing regarding the execution of the search warrant, and for an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). The United States filed a superseding indictment against Mr. Sassani on May 29, 1996. On July 29, 1996, Mr. Sassani entered a conditional plea of guilty to Count VI of the superseding indictment. Count VI charged possession of child pornography in violation of 18 U.S.C. 2252(a)(4). As part of the factual stipulations underlying the plea, the defendant admitted to transmitting pornography on September 30, 1994.

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[3] Mr. Sassani has been charged in Maryland state court with possession of narcotics. The case is pending.

[4] On the hard drive of the defendant's computer were 16,226 files, of which 56 were graphic images of individuals apparently under eighteen years of age. On 382 floppy diskettes were 6,731 files of which 120 were graphic images of individuals apparently under eighteen.

At the conclusion of a four-day sentencing hearing, the district court sentenced Mr. Sassani to eighteen months incarceration.[5] The defendant raises three issues on appeal. First, the defendant argues that the district court erred when it denied an evidentiary hearing on the defendant's challenge to the sufficiency of the affidavit underlying the application for a search warrant. Second and related to the first, the defendant argues that the district court erred in denying the defendant's motion to suppress the evidence seized under the search warrant. Finally, defendant argues that the district court erred in refusing to depart downward for reduced mental capacity.

The Franks Hearing

The defendant argues first that the district court erred in refusing to hold a hearing on the defendant's motion to suppress the evidence seized from Mr. Sassani's home. However, a hearing on a motion to test the sufficiency of the warrant is required only under certain circumstances. Simmons v. Poe explains:

> This Court has construed the Supreme Court's opinion in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), very strictly, finding in large part that Franks hearings are not required unless an omission from a warrant affidavit is the product of a deliberate falsehood or done in reckless disregard of the truth. In United States v. Colkley, 899 F.2d 297 (4th Cir. 1990), this Court articulated the two-pronged standard under which Franks claims must be analyzed. In that case, we addressed whether an evidentiary hearing was required under Franks

[5] This was the minimum possible sentence in the Sentencing Guideline range.

> where the defendant challenged the affidavit used in support of his arrest warrant on the grounds that it failed to note that numerous witnesses did not identify him in a photographic spread, and because the police officer based the height description of the defendant in disregard of the testimony of some witnesses. 899 F.2d at 299. In finding that a Franks hearing on the facial validity of the affidavit was not warranted, we articulated a two-part threshold test for making such a determination: a Franks hearing is warranted if (1) the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in a warrant affidavit, and (2) the defendant shows that the false information was essential to the probable cause determination. Id. at 300.

47 F.3d 1370, 1378 (4th Cir. 1995). See also United States v. Hartsell, 127 F.3d 343 (4th Cir. 1997), citing United States v. Jeffus, 22 F.3d 554, 559 (4th Cir. 1994) ("We have held that a defendant must first make a showing that an affiant's statement in a warrant affidavit was deliberately or recklessly false and that the remaining facts contained in the affidavit are inadequate to sustain a finding of probable cause."). In the instant case, the defendant must show that information to which he objects was an intentionally false statement or one madewith "reckless disregard for the truth." Id. Additionally, however, the defendant bears the burden of showing that the information to which he objects was central to the finding of probable cause. The defendant has failed to make this showing.

The search warrant contained a seventeen-page affidavit filed by FBI Special Agent Courtland C. Jones. The

affidavit contained six sections (Introduction, Child Pornographers, Computers and Child Pornography, America OnLine, Probable Cause, and Search & Seizure of Computer Systems). The defendant objects particularly to Section II (Child Pornographers) and Section V (Probable Cause) of the affidavit, arguing that the use of a profile in Section II was in "reckless disregard of the truth" and that Section V contains misstatements of fact.

Section II presents Special Agent Ken Lanning's profile of a child pornographer.[6] The profile includes the following elements: 1. Child pornography collectors exhibit many of the same traits as pedophiles or preferential child molesters; 2. Such individuals keep the pornographic materials for long periods of time in secure locations such as the privacy of their homes; and 3. They meet and correspond with others who share the same interest in child pornography. The defendant argues that this profile is inflammatory and has no connection to the defendant.

The defendant does not present the court with support for his assertion that the profile was required to meet the standards of Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), nor can this court find any such requirement. It is clear that the use of profiles, in conjunction with other evidence, to establish probable cause is allowable. See United States v. Aguiar, 825 F.2d 39, 40-41 (4th Cir. 1987) (finding the use of a drug courier profile along with other evidence to be sufficient to establish probable cause); Simmons v. Poe, supra, 47 F.3d at 1378 (discussing the use of a profile in establishing probable cause for a warrant). In the instant case, the profile was used in the affidavit to suggest that the defendant meets the profile of a trafficker in child pornography and that, therefore, certain behaviors may be expected, including the behavior of keeping and storing pornographic

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[6] The agent works and writes extensively in the field of investigation of child pornography and preferential child molestation.

images. The profile compared child pornographers to pedophiles, in terms of certain characteristics. It did not suggest that the two were the same. To the extent that Mr. Sassani objects to the alleged insinuation that he may be a pedophile, this court does not read the affidavit so to allege. In any case, the warrant established sufficient probable cause even should we find that the affidavit incorrectly insinuated pedophilia. More than the profile, the defendant's admission in his own Internet user profile that his hobbies included GIFs [7]and the fact that the defendant had transmitted such graphic files over the Internet suggested in and of themselves that such files might be found in the defendant's home and that a computer was being used in the home to transmit and receive images electronically.

The defendant also alleges that the "Probable Cause" section of the affidavit contained numerous misstatements of fact. The section identified BIG MIKE 8 as the code name used by Mr. Sassani. The section also identified BIG MIKE 8 as holding the phone number at Mr. Sassani's home address and as residing at Mr. Sassani's home address. The section also chronicled BIG MIKE 8's receipt and distribution of child pornography between August 1994 and March 1995. The affidavit represents that BIG MIKE 8 transmitted child pornography on ten occasions. The defendant argues there were only four occasions. The affidavit also represents that in March 1995, the defendant transmitted child pornography on four occasions and the defendant objects that he transmitted pornography only once in March 1995. The defendant further objects to the affidavit's representation of the total number of transmitted images, the "depiction" of the images (presumably, the agent's characterization of the subject matter of the graphic files transmitted), the circumstances of transmission to an

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[7] A GIF is a graphics interchange format in which files may be stored and transmitted. The GIF format, owned by Compuserve, is widely used on the Internet for the transmission of all types of graphics files, not just pornographic images.

undercover agent in September 1994, and the meaning of GIFs as that term is used in the affidavit.

The Franks test requires a hearing on a motion to suppress only if the alleged misinformation is reckless and if probable cause would not exist without that information. The district court found, as do we, that the affidavit, even without the offending facts, was sufficient basis for probable cause. Whether there were four transmissions or ten, whether there was an actual transmission at one point or a forwarded transmission that originated from the defendant, the fact remains that there were transmissions of pornography by the defendant, giving rise to probable cause to search the defendant's home. We find no error in the district court's determination that a Franks hearing was not required.

The Search Warrant

The defendant also appeals the denial of the motion to suppress itself. The defendant asserts first that the warrant was not supported by fresh probable cause and, second, that the warrant failed to state with sufficient particularity the places to be searched and things to be seized.

The Fourth Amendment of the Constitution requires that probable cause support a warrant. The information on which such probable cause is based must be sufficiently fresh to warrant a belief that material evidence of criminal activity may yet be found in the area to be searched. United States v. McCall, 740 F.2d 1331, 1335-1336 (4th Cir. 1984). McCall states:

> The fourth amendment bars search warrants issued on less than probable cause, and there is no question that time is a crucial element of probable cause. A valid search warrant may issue only upon allegations of "facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that

> time. Whether the proof meets this test must be determined by the circumstances of each case." Sgro v. United States, 287 U.S. 206, 210-11, 53 S.Ct. 138, 140-41, 77 L.Ed. 260 (1932). See also, e.g., United States v. Watson, 423 U.S. 411, 449 n. 14, 96 S.Ct. 820, 840 n. 14, 46 L.Ed.2d 598 (1976) (Marshall, J., dissenting); United States v. Freeman, 685 F.2d 942, 951-52 (5th Cir. 1982); United States v. Beltempo, 675 F.2d 472, 476-79 (2d Cir.), cert. denied, 457 U.S. 1135, 102 S.Ct. 2963, 73 L.Ed.2d 1353 (1982); United States v. Button, 653 F.2d 319, 324-25 (8th Cir. 1981).

Id. McCall explains that a continuing pattern of behavior might give probable cause where a single offense would not after a certain period of time. There must exist probable cause that evidence of criminal activity will exist at the time of the search. In the case before the court, such probable cause existed. Numerous cases support a finding that distribution of child pornography on several different occasions may provide sufficient probable cause despite delay between a distribution and the date a search warrant is sought or executed. See, e.g.,United States v. Bateman, 805 F.Supp. 1041, 1043 (D.N.H. 1992) (upholding warrant with seven-month delay between distribution of child pornography and execution of the warrant because of the"unique nature of the creation, storage, keeping, alteration, potential destruction of the child pornography material" and the "recognized interest which the states and the federal government have in drying up the distribution network for child pornography"); United States v. Rakowski, 714 F.Supp. 1324, 1330 (D. Vt. 1987) (upholding warrant based on information one to six months old because"those who collect child pornography keep the pornography, do not destroy their collections, and keep the pornography accessible"); United States v.Lacy, 119 F.2d 742, 745 (9th Cir. 1997) (upholding search warrant based on

information ten months old because "the[agent] explained that collectors and distributors of child pornography value their sexually explicit materials highly, `rarely if ever' dispose of such material, and store it `for long periods' in a secure place, typically in their homes"); United States v. Riccardelli, 998 F.2d 8, 12 (1st Cir. 1993) (stating, "history teaches that [pornography] collectors prefer not to dispose of their dross, typically retaining obscene materials for years"); United States v. Harvey, 2 F.3d 1318, 1322 (3d Cir. 1993) (basing, at least in part, a conclusion that a warrant was not based on stale information on the fact that those who collect child pornography tend to keep it); United States v. Rabe, 848 F.2d 994, 996 (9th Cir.1988) (holding warrant not based on stale information despite two year delay between original seizuresand warrant because more recent letters indicated that pornographic material was still being kept by the defendant); United States v. Lamb, 945 F.Supp. 441, 459 (N.D.N.Y.1996) (holding warrant information not stale despite five-month lapse between last transmission over Internet because"FBI Special Agent Lanning, an expert in this field, [stated] that collectors of child pornography rarely dispose of materials they obtain and almost always maintain and possess their material ... in the privacy and security of their homes or some other secure location.'").

The defendant transmitted pornography on several separate occasions between 1994 and 1995. The last transmissions referred to in the affidavit supporting the warrant occurred on March 11, 1995. On that date, BIG MIKE 8 transmitted four files to the undercover agent. The four separate image files were "HARD011C.GIF" (3:45 AM), "HARD002C.GIF" (3:45 AM), "HARD003C.GIF" (3:45 AM), and "HARDOO1C.GIF" (3:46 AM). Contrary to the defendant's assertions, these do not form part of one transmission, although alloccurred within minutes. These are four separate transmission, accomplished in a brief time. On September 19, 1995, six months later approximately, the agents applied for a search warrant. These transmissions,

following the pattern of transmission in 1994 and 1995, provided sufficiently fresh probable cause for the warrant issued in September 1995.

The defendant next argues that the search warrant described the places to be searched and things to be seized with insufficient particularity to withstand the requirements of the Fourth Amendment. The Fourth Amendment requires that a search warrant describe with particularity the place to be searched and the evidence to be seized. United States v. Owens, 848 F.2d 462, 463 (4th Cir. 1988). The particularity requirement is designed to prevent "a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Andresen v. Maryland, 427 U.S. 463, 480 (1976). A warrant meets the particularity requirement "if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." Steele v. United States, 267 U.S. 498, 503 (1925). "[T]he test for the necessary particularity is a pragmatic one: `The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved....[T]here is a practical margin of flexibility permitted by the constitutional requirement for particularity in the description of items to be seized.'" United States v. Torch, 609 F.2d 1088 (4th Cir. 1979), quoting United States v. Davis, 542 F.2d 743, 745 (8th Cir. 1976). Unlike with murder weapons or drugs, when an offense concerns the use of hard copy or electronic files and documents a court cannot be sure which files will be relevant and the warrant may not be able to state as specifically what should be searched and seized. Therefore, courts have required less particularity in the warrant. United States v. Torch, 609 F.2d 1088, 1090 (4th Cir. 1979). Courts have acknowledged the need for the use of generic terms in warrants seeking evidence of child pornography and have upheld more generally-worded warrants so long as the warrant limits the discretion of the officers conducting the search. See Torch, supra, 609 F.2d at 1090 (holding sufficient a warrant

for "records, documents and writings related to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films"); United States v. Layne, 43 F.3d 127, 132-33 (5th Cir. 1995) (upholding two warrants describing materials to be sought and seized as follows: "assorted pornographic videotapes; assorted pornographic magazines; assorted devices;" and, in the second warrant, "Child pornography; records of victims; drawings; pictures; computer disks, sexual devices; videotapes; child abuse books; magazines; audiotapes; and any other obscene or child pornographic material;" finding the warrants sufficiently limited officers' discretion in searching); United States v. Kimbrough, 69 F.3d 723, 727 (5th Cir. 1995) (finding sufficiently particular warrants' authorization for seizure of "`bills, correspondence, receipts, ledgers, Postal receipts and telephone records all of which show orders and deliveries to or from any known foreign or domestic distributer of child pornography'"); United States v. Hurt, 808 F.2d 707, 708 (9th Cir. 1987) (finding warrant authorizing search for material depicting individuals under sixteen years of age engaged in "sexually explicit conduct" to be sufficiently particular to limit officer's discretion); United States v. Jacobs, 513 F.2d 564, 567 (9th Cir.1974) (finding sufficiently particular a warrant for"certain documents pertaining to the interstate shipment of obscene materials").

In the case sub judice, the warrant listed among the items to be seized any computers, tapes, cassettes, cartridges, streaming tape, commercial software and hardware, computer disks, disk drives, monitors, printers, modems, tape drives, disk application programs, data disks and graphic interchange format equipment which could be used to depict, distribute, possess or receive child pornography. This listing directed the FBI agents to search those items in the home with direct connection to the alleged crime of the defendant: distribution and receipt of child pornography through the Internet by use of a computer. Courts have been clear that, in the case of child pornography, a warrant allowing seizure of a computer and all

its associated printing, storage, and viewing devices is constitutional. The computer, applications, and various storage devices not only may contain evidence of distribution of child pornography, but are also the instrumentalities of the crime. See Davis v. Gracey, 111 F.3d 1472, 1480 (10th Cir. 1997) (upholding seizure of computer and all files contained therein because probable cause supported seizure of computer as an instrumentality of the crime of distribution of obscene materials); United States v. Kimbrough, supra, 69 F.3d at 727 (upholding warrant allowing seizure of "hardware, computer disks, disk drives, monitors, computer printers, modems, tape drives, disk application programs, data disks, system disk operating systems, magnetic media-floppy disks, CD ROMs, tape systems and hard drive, other computer related operational equipment ... used to visually depict a minor engaging in sexually explicit conduct"); United States v. Lacy, supra, 119 F.2d at 745 (allowing seizure of entire computer system, hardware and software, because "the affidavit in this case established probable cause to believe Lacy's entire computer system was "likely to evidence criminal activity"). But see United States v. Kow , 58 F.3d 423, 426 (9th Cir. 1995) (holding warrant to be overbroad when allowing seizure of computers and computer files and storage devices because it failed to limit discretion in any way such as defining the criminal conduct at issue). The warrant in the case before us described the types of items to be seized and the crime for which the items were sought. The description contained in the search warrant limited the agents' discretion in the search by directing them to seize evidence of participation in the distribution of child pornography over the Internet. We find no error with the district court's determination that the warrant spelled out with sufficient particularity the items to be seized.

In addition to the particularity requirement, the search actually conducted under a warrant must be limited to the areas and evidence authorized by the warrant. Owens, supra, 848 F.2d at 463. Evidence seized in violation of the Fourth Amendment requirement that the search be limited to the

confines of the warrant is subject to exclusion. Owens, supra, 848 F.2d at 463, citing Weeks v. United States, 232 U.S. 383, 98 (1914); Mapp v. Ohio, 367 U.S. 643, 655 (1961).

In the instant case, the district court appropriately found that the FBI agents remained within the limits of the warrant and that the search, therefore, was not in violation of the Fourth Amendment.

The Sentence

The defendant also appeals his sentence, arguing that the district court applied the incorrect legal standard in denying a downward departure. At the sentencing hearing, Mr. Sassani claimed that he should receive a downward departure because he suffered from various mental disorders, including Tourette's Syndrome, Obsessive Compulsive Disorder, a major depressive disorder, and numerous neuro-psychological deficits associated with Attention Deficit Disorder. These mental disorders, Mr. Sassani argued, caused him to possess child pornography. At the sentencing hearing, Judge Chasanow declined to depart downward because she concluded that the defendant did not suffer from significantly reduced mental capacity such as might force him to possess child pornography.

We review de novo the district court's interpretation of the legal standard to be applied to an application for a downward departure.United States v. Rybicki, 96 F.3d 754, 758 (4th Cir. 1996); United States v. Han, 74 F.3d 537, 549 (4th Cir. 1996). Unless this court finds that the district court erroneously believed that it did not have the discretion to depart downward, this court will not review the district court's discretionary refusal to depart downward from the applicable guideline range. United States v. Brock , 108 F.3d 31, 33 (4th Cir. 1997); United States v. Bayerle, 898 F.2d 28, 30-31 (4th Cir. 1990); 18 U.S.C.A. 3742(a), (b) (West 1985 & Supp.

1996).[8]

Section 5K2.13 of the Sentencing Guidelines states that a downward departure from the Guideline sentencing range may be appropriate where "the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense." (U.S. Gov't Printing Office 1997). The courts have explored the impact of this policy statement on sentencing guideline departures in a series of cases. United States v. Glick, 946 F.2d 335 (4th Cir. 1990), explained that a court should determine first whether the defendant suffered from diminished mental capacity, and, second, whether such diminishment was a cause of the offense. The court stated, "Diminished capacity need not be the sole cause of the offense to justify a departure, but should `comprise[ ] a contributing factor in the commission of the offense.'" Id., quoting United States v. Ruklick, 919 F.2d 95, 97-98 (8th Cir. 1990). Unlike Glick, which focuses on the second prong of the test it announced, United States v. Goossens , 84 F.3d 697, 701 (4th Cir. 1996), focuses on the first prong -- the determination of diminished mental capacity itself. The court in Goossens requires that the defendant's mental capacity not simply be partially diminished, but that it be so diminished as to render the defendant incapable of processing information or reasoning. Goossens, supra, 84 F.3d at 701. United States v. Withers, 100 F.3d 1142 (4th Cir. 1996), revisits the second Glick factor and more closely links the two factors. Withers focuses on the causal relationship between the mental

[8] Defendant suggests that the district court's determinations of fact, such as the merit of defendant's claim of reduced mental capacity, should be reviewed for clear error. While this would be true had the lower court determined that it should depart, see Rybicki, supra, 96 F.3d at 758, this court lacks jurisdiction to review a district court's denial of a departure despite the factual evidence presented by the defendant. Brock, supra, 108 F.3d at 33.

impairment and the criminal behavior and suggests that the contributing factor analysis announced in Glick requires more than simply a contribution insofar as leaving defendant "open to suggestion." Id. at 1147-48. Withers requires that the diminished mental capacity actively contribute to the behavior, such as by rendering the defendant incapable of reasoning. Id., citing Goossens, supra, 84 F.3d at 701. Thus, the Glick, standard for a downward departure under Section 5K2.13 p.s., as explicated in Goossens and Withers, remains the law in this circuit.

Judge Chasanow stated that the legal standard for a downward departure under Section 5K2.13 of the Sentencing Guidelines is whether the defendant suffered from "significantly reduced mental capacity [that] bears a causal relationship to the crime." We now find that the district court applied the appropriate legal standard in this case. Because we so find, we do not reach the issue of whether the district court properly found a downward departure unwarranted by the facts of this case, as such review is beyond our authority.

Conclusion

For the reasons stated above, the order of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL B. SASSANI,
Defendant.

Criminal No. DKC 96-0012

ENTERED: DECEMEBER 13, 1996

ORAL OPINION OF
THE HONORABLE DEBORAH K. CHASANOW

THE COURT: I recognize my authority under the guidelines to consider a departure for diminished capacity under 5K2.13. There is no dispute as to the actual words of that guideline.

If a defendant committed a non violent offense while suffering from significantly reduced mental capacity not resulting from voluntarily use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

I do understand that there isn't a contention, and if there is I reject it, that depressive, major depressive, obsessive compulsive disorder would not qualify in some fashion under that guideline. I certainly conclude that they are capable of affecting a person's mental capacity.

There is no dispute here, at least I haven't heard it

articulated, that the offense here is a non violent one, so it would qualify under the criminal history category I. I don't find that there is need for incarceration to protect the public.

The issue is, however, what conclusions the Court reaches on the factual record as to whether the defendant was suffering from a significantly - - a significantly reduced mental capacity and whether, if he was, the reduced mental capacity contributed to the commission of the offense.

The most recent Fourth Circuit case is the Withers case decided only on November 19th, 1996. The Court points out to all of that that the guidelines instruct that mental and emotional condition are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

In order to qualify for a departure under this section, a defendant must be suffering from something greater than emotional problems or hardship. A defendant must demonstrate that his or her significantly reduced mental capacity bears a causal relationship to the crime. This causal-connection must consist of more than an emotional weakness that leaves one open to suggestion.

Rather, in order to qualify for a diminished capacity departure, a defendant must show an inability to process information or to reason.

Like Mr. Adelman, I don't think that there is a requirement that the defendant show a total inability or a told lack of ability to process information or to reason. But I do think, and perhaps it is immaterial, that what we're really talking about is an impairment in an ability
to process information or to reason. The mental capacity must in some fashion contribute to the commission of the offense.

And I think under what I've been asked to consider here, there is - - there really is no room for debate as to whether contribution means something broader than impairs an ability to process information or to reason, because I think

the testimony that I have heard from the defense witnesses goes to that type of contribution to the offense.

And that is that, as Dr. Fiester articulated, that Mr. Sassani was not able to think through the consequences of the activity. And, as we've heard today reiterated, Dr. Kleinman opined that he could not fully appreciate the implications of what he was doing.

(Pause.)

THE COURT: I conclude, based on all of the evidence that I have heard, that the defendant was not suffering from a major depressive disorder or from obsessive compulsive disorder at the time of the offense in September of 1995.

I find, rather, that he was suffering from bereavement, starting in February '94, and continuing for some months.

He probably in the summer of '94 withdrew to some Extent from the society and activities that he otherwise had been engaged in, but this was not to a significant degree.

It is somewhat ironic, I guess, that those people who can tell me or profess to be able to tell me how he changed seem to state that they saw him or spoke to him on a very regular basis, weekly, if not more often, and that does not paint the picture of someone who is significantly mentally affected by bereavement or depression.

The other significant aspects of my decision are Dr. Fiester, who testified first and saw the defendant first, while she remarked on some compulsive traits, did not even come close to diagnosing obsessive compulsive disorder.

Yet she, as I'm sure counsel are aware, testified in another case where that was clearly her diagnosis and the basis upon which the Court ended up ruling. So there is no reason that she would miss something.

Yet, Dr. Kleinman came in to testify because he thought that everyone, most notably I suppose Dr. Lion, was missing the connection between the tic disorder and

obsessive compulsive disorder exacerbated by the depression.

There is simply not sufficient evidence for me to conclude, and I don't, that there was a significantly reduced mental capacity due to any compulsion to collect child pornography.

Or, otherwise, or that the depression significantly reduced the defendant's mental capacity by the time of the offense in September, or, indeed, even earlier.

Rather, I think that the circumstance of the bereavement meant that he was perhaps staying more at home, was coupled with the unfortunate circumstance, coincidence, that the computer and the America On Line account allowed the defendant to have an outlet that was fairly easy to access for his interests.

I pressed Mr. Adelman through the process of this hearing, in part in response to his pressing, that the adult pornography material was not relevant.

I cannot accept that a person who had exhibited an interest in adult pornography as early as ten years before by the videotaping somehow was caused to collect and exchange child pornography starting in 1994 because of a compulsive symptom, even if exacerbated by a depression. It just doesn't compute.

Rather, I conclude, based on the evidence, that when Dr. Kleinman says that Mr. Sassani did not fully appreciate the implications of what he had done, even though he knew it was illegal, or immoral, was that in his mind, in his system of right and wrong, he didn't accept the illegality of the child pornography law, and that because he felt he was able to conduct this activity in the privacy and anonymity of his home, he chose to do so.

And if it has taken many sessions in therapy for Dr. Kleinman to help Mr. Sassani get over that, that's wonderful. But it has nothing to do in my mind with an obsessive compulsive disorder or depression, that, at most, we have here proof of emotional problems.

At most, we have an emotional weakness that left him open to suggestion, and that is, that the computer, as I've already said, and I now repeat, allowed him the privacy he thought, the anonymity, he thought, to do what he knew the law prohibited with the expectation that he would not be caught.

He did acknowledge to me just now that he now understands that even if you don't purchase child pornography, that the trafficking in it, not trafficking in the sense of money, but exchanging of it, the willingness to exchange, and to send on to others does help to foster a circumstance and atmosphere where more children will indeed be victimized by those who seek to create and to traffic in child pornography.

There are victims. To say that society is the victim, as I found in the grouping decision, does not mean that there is no victim when one possesses and in this case has admitted to receipt over the internet of the child pornography.

Dr. Lion testified that he didn't know of any connection between the proffered mental disorders and possession of child pornography. I'm not certain that he, in fact, reasoned fully here.

I am not saying that these disorders can never affect the commission of a criminal act. I have obviously handled other cases where we have found that they did.

In this case, however, I simply am not persuaded by the evidence that the bereavement was significant enough, or disabling enough, to qualify as significantly reduced mental capacity.

I am not persuaded, based on the evidence, that the defendant had a significantly reduced mental capacity due to any compulsive need to collect or hoard anything, least of all the child pornography.

Rather, I conclude only that in the defendant's mind that there was not sufficient justification for the law prohibiting child pornography and possession of it that led to

this, coupled with the coincidence the computer and his being a little more at home than he had been, and a little bit more alone than he had been, led to his use of the computer and its escalation over the months to the possession of the child images on September 1995.

So, for all of those reasons, I decline to grant the defendant any departure based upon 5K2.13.

On the other hand, I do not see any reason to impose above the minimum amount under the guidelines of 18 months. This is perhaps where I would take into account the information that I have had with regard to the defendant's acknowledgement now and realization that there is good reason for making possession of child pornography illegal.

Accordingly, it is the judgment of the Court that Mr. Sassani be committed to the custody of the Attorney General and the Bureau of Prisons for a term of 18 months.

This will be followed by a term of supervised release of two years.

The defendant is to abide by all of the standard conditions and supervised release, including, of course, that he not commit any crimes in violation of federal, state, or local law.

The defendant has expressed his own need for continued mental health counseling, and I will not make that a condition of supervised release. I think he will decide whether he wants to continue.

The fine will be $40,000. The defendant had acknowledge ability to pay whatever fine was appropriate within the range, so there is no question that he can pay that much, and I haven't had a request that there be any determination of installments as opposed to payment in a lump sum, but I would consider that, but I would need more information in order to do that.

The law also requires the imposition of a $50 special assessment. This is money that goes into a fund to help people who are victims of crime and for that reason have additional financial problems that they didn't otherwise have.

I understand, or I assume that there would be no objection to voluntary surrender, but I understand there's also a request for a stay pending appeal; is that correct?

MR. ADELMAN: Yes, Your Honor. We, on the record here, request that he be permitted to voluntarily surrender, as designated by the Bureau of Prisons and the probation office, and until that time that he continue on the same conditions of release as hereto imposed.

(Pause.)

THE COURT: Does the government have anything to say?

MS. WILKINSON: Your Honor, under the plea agreement, we agreed not to oppose the release of the defendant pending sentencing on the same terms of release as imposed on January 30, 1996.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-4011

CR-96-12DKC

Entered: March 31, 1998

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

MICHAEL BRUCE SASSANI,

Defendant – Appellant.

On Petition for Rehearing
with Suggestion for Rehearing in Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Filed: September 9, 1997
Entered: September 9, 1997

VIA FACSIMILE and
FEDERAL EXPRESS

Clerk of the Court
United States Court of Appeals
for the Fourth Circuit
1100 E. Main Street
Richmond, VA 23219

Re: United States v. Micahel B. Sassani
Record # 97-4011

Dear Sir:

Pursuant to Rule 28(j), FRAP and Rule 28(f) of the Local Rules of this Court, appellant Michael B. Sassani, through undersigned counsel, hereby draws the Court's attention to supplemental authority which supports the position of Mr. Sassani in the briefs he has filed in this appeal. This authority is the August 28, 1997 opinion of the United States Court of Appeals for the Third Circuit in United States v. McBroom, 1997 U.S. App. Lexis 22806 (8/28/97).

The McBroom opinion directly supports the arguments Mr. Sassani made in connection with the application of Section 5K2.13 of the Sentencing Guidelines to his sentencing. These arguments appear in Section III, pages 34-40, of his opening brief and Section III, pages 12-18, of his reply brief. For the Court's convenience a copy of the McBroom opinion is attached. We particularly draw the Court's attention to pages 12 to 18 of the Third Circuit's opinion in McBroom.

Respectfully submitted,

/s/ Roger M. Adelman
Counsel for Michael B. Sassani

Enclosure

cc: Michael B. Sassani
AUSA Sandra Wilkinson

OFFICIAL TEXT OF THE PROPOSED AMENDMENT TO GUIDELINE SECTION 5K2.13 SUBMITTED TO CONGRESS ON MAY 1, 1998. 63 FEDERAL REGISTER 28202, *28207. EFFECTIVE DATE: NOVEMBER 1, 1998, UNLESS MODIFIED OR REJECTED BY CONGRESS.

§5K2.13. Diminished Capacity (Policy Statement)

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. For purposes of this policy statement –

"Significantly reduced mental capacity" means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

Reason For Amendment (Excerpt)

The amendment also adds an application note that defines "significantly reduced mental capacity" in accord with the decision in United States v. McBroom, 124 F.3d 533 (3d Cir. 1997). The McBroom court concluded that "significantly reduced mental capacity" included both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful). The application note specifically includes both types of impairments in the definition of "significantly reduced mental capacity".

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL B. SASSANI,
Defendant.

Criminal No. DKC 96-0012

EXCERPTS OF TRANSCRIPT
OF PROCEEDINGS BEFORE
THE HONORABLE DEBORAH K. CHASANOW,

DECEMEBER 3-4, 1996

TESTIMONY OF LEONARD NEWMAN:

* * *

Direct Examination

Remaining 3846 images, 37690 depicted adult material or nonsexual material.

A. That's correct.

Q. How did you make that determination?

A. I used numbers provided to me by Dr. Susan Fiester.

Q. Did you work with her in preparing this chart?

A. Yes, I did.

Q. She's a forensic psychiatrist?

A. Yes.

Q. And finally on Exhibit 4, line 4, it said there were thus remaining 56 images illegally depicting children. How did you determine that number?

A. I sued the number provided by the Government's analyst, whose name -- if you can -- I believe it could be Walter Golden, but I think you'll have to refresh my recollection on that.

Q. Well, where did the Government's information -- how did it come to you? In what form did it come to you?

A. It was reported to me by Maria Vacchio and Dr. Fiester that this is a number which the Government analyst had determined could be illegal materials. There was an additional small number, I think 17, of images that had been identified, but they were gleaned from a review of the tapes, which are backups.

Q. Were they duplicates?

A. They are either duplicates or they are images that Mr. Sassani had erased from his hard drive.

Q. Okay. Now you mentioned the Government's expert. Are you familiar with the name of Dr. Alan Walker?

A. Alan Walker. That's the name I was trying to remember earlier.

Q. And is the number 56 images from his review of this material?

A. Yes, it is.

Q. In other words, this is the Government's number, right?

A. Yes, it is.

Q. All right. If you'd be kind enough to turn to Exhibit 3.

A. Yes, I did it.

Q. How many floppy diskettes were there?

A. 382.

Q. Did you view them all or analyze them all?

A. Yes, I did.

Q. Did you determine how many files were on those 382 floppy diskettes?

A. 6, 731.

Q. And of those, how many were typical home computer program files as you've defined it?

A. 5, 618.

Q. And again, did you make that computation?

A. Yes, I did.

Q. Of the remaining files, the image files, 1,113, did you determine how many depicted adult material or nonsexual material?

A. Dr. Fiester determined how many might have included sexual material, and the number was 933.

Q. And finally, did you determine how many images depicted children?

A. It was her estimate -- I believe actually her number was not exactly 120. I believe her estimate was approximately 120. I believe the exact number, 120, was the number provided by the FBI's regional office in Pocatello, Idaho.

Q. So the 120 number that appears here is again the Government's number?

A. It's the Government's number.

Q. To make certain, Exhibit 3, Number 4, depicts 120 images illegally depicting children, correct?

A. Correct.

Q. And that figure was supplied by the Government?

A. That is the figure supplied by the Government.

* * *

TESTIMONY OF SUSAN FIESTER, M.D.:

* * *

Direct Examination

Court has a copy. It's in the record as an attachment to our memorandum with respect to downward departure.

THE COURT: Right.

MR. ADELMAN: And I'll mark a copy, if I might.

THE COURT: Um hum.

Q. Doctor, is that your report, Exhibit 6?

A. Yes, it is.

Q. Is it the report of July 12th?

A. Yes.

Q. Does it state your findings and conclusions as of that time?

A. Yes.

Q. Now, since that time you've mentioned in your testimony that you have talked to Mr. Sassani?

A. That's correct.

Q. That you've talked to other mental health professionals?

A. Yes.

Q. Is that an unusual thing for your to do?

A. No. I always, as far as I can recall, continue potentially gathering information up until the time of the case because new information or other data might turn up that's relevant to the ultimate question.

Q. Now, in your report and in your proffered testimony

that we'll get to regarding forensic issues, you reached certain conclusions about mental condition in relation to the crimes, correct?

A. Yes.

Q. Are those proffered conclusions contained in your report of the 12th of July?

A. Yes, there are.

Q. Has anything that you've learned in the intervening time materially changed your opinions?

A. No.

Q. What have you --

A. I'm sorry. In fact, the information I learned helped confirm my opinion.

Q. You don't have any new diagnosis?

A. No.

Q. You haven't thrown anything out?

A. No.

MR. ADELMAN: May I proceed, Your Honor?

THE COURT: Yes.

MR. ADELMAN: Thank you.

Q. You were recounting the background information of Mr. Sassani, and I asked you why it was that you elicited that

from him. What was the psychiatric reason you wanted to know this?

A. The background information?

Q. Yes.

A. Because in order to understand an individual's behavior it's important to understand as much as possible about their birth and development, family history, education, as much as possible about who -- what factors have contributed to the development of that person.

Q. I believe you left off by telling us a little bit about Mr. Sassani's college years.

A. Yes.

Q. Might you continue?

A. Yes. During his college years, he began to date a little more actively. During these years, I might add, including his years when he was achieving puberty and was an adolescent, he denied any very significant involvement of or use of pornographic material other than I believe he described occasionally masturbating to a fantasy of a picture of a woman, such as a Playboy image.

Q. Is that a sign or symptom of a mental disorder?

A. No, that seems to be relatively ordinary for an adolescent boy.

Q. All right.

A. And he also denied any, during that time and also subsequent to that time, any sexual interest in children or any

sexual contact at all with children. While he was in college and graduate school, he not only attended school, but he also was involved in producing films, and he studied art privately and also worked as a teaching assistant.

He had several relationships during college and graduate school, which lasted approximately six months to a year. These were usual heterosexual relationships, you know, dating and some of them involved sexual activity.

After graduating, he performed student teaching, and then while he was in graduate school he was drafted into the military and served in the Army for a year and a half, starting in 1971, as an arts and media specialist. He was -- in which he produced films for the Army and worked in a craft shop and ran the photography lab at two different bases, I think one in the east coast and one in the midwest.

After he was discharged from the Army, he returned to graduate school and received his master's degree in fine arts and then obtained a job with the Smithsonian Research Foundation producing television programs on science and museum conservation for approximately four and a half years, and then after he obtained a position at the National Galley of Art, in which his role was to develop a state-of-the-art television studio for the new east wing of the Gallery.

And he later became the director of the audiovisual production department at the National Gallery, and he stayed in that position there for 13 years and produced television programs and multimedia slide shows and public service television spots for advertise exhibits and such at the Gallery. In fact, during that time he won three Emmy awards for his public service announcements that he produced.

In 1990, after being with the Gallery for 13 years, he took a position with the Peace Corps to produce educational TV programs for their use and also consulted to a variety of the Government agencies, the Justice Department and several of the museums in town, and he worked there until 1995, having been put on leave without pay in July of 1994.

Q. Let me go back and ask you whether you determined whether Mr. Sassani had ever been married?

A. Yes. He began dating a fellow student, who was a geologist, in 1974, and after dating for about three years, they married, and they remained married for about three and a half years and then subsequently divorced.

Q. Did you make any scrutiny as to whether the relationship was in any way abnormal in terms of sex?

A. According to his report – I didn't attempt to contact his ex-wife, but according to his report, there didn't appear to be anything unusual about his sexual relationship with his wife.

Q. Now, did you, in the course of your study of the background of Mr. Sassani, and indeed the present status, talk to Ms. Koby?

A. Yes, I did.

Q. And for what purpose or purposes?

A. I talked with her to help confirm information I had received from him, confirm or disconfirm it, and to understand from her perspective a little bit about the nature of their relationship and –

Q. I wonder – I'm sorry.

A. And what had gone on during the time she was associated with him.

Q. When was that?

A. For approximately the prior 10 years.

Q. You mean to now?

A. Yes.

Q. So she's been his friend for about 10 years?

A. Yes.

Q. Now, I take it, or will you refer to things she said in the course of your analysis as we go along?

A. Yes.

Q. Did you contribute to some of the conclusions that you reached?

A. Yes. The information I obtained from her, yes.

Q. Now, did you determine whether Mr. Sassani in the past or presently had any problem with alcohol or substance abuse?

A. Yes.

Q. What did you determine?

A. That he infrequently uses alcohol and has not had any period of time any problem with excessive alcohol use.

With regard to any drug use, he smoked some marijuana during his time in college and occasionally after that time but gradually used less and less until he's being using none for many years now.

And he denied the use of other substances or abuse.

Q. Did you confirm that point with Ms. Koby?

A. I believe I did.

Q. Now, prior to your entrance into the case, had Mr. Sassani ever had occasion to seek psychiatric or mental health treatment or assistance?

A. No, he did not receive any mental health treatment.

Q. Just so we're clear, was your role in the case to provide therapy?

A. No.

Q. And why in this case didn't you offer that service?

A. Because it can create a problem with conflicting interests in the role as a more neutral evaluator, that can come into conflict with the role as an advocate for a patient, which is often helpful and necessary in treating a person.

Q. As far as you know, prior to the arrest in this case, had Mr. Sassani ever been arrested or charged with a crime?

A. No.

Q. Was there any history in his family of psychiatric or substance abuse disorders that you know of?

A. No.

Q. Did you evaluate Mr. Sassani's medical history for the

* * *

with him more frequently.

Q. Before you formed your opinions and filed your report on July 12th did you consult with Dr. Kleinman about Mr. Sassani?

A. Yes.

Q. Well, what did he inform you, if anything, what was significant to you?

A. Well, we talked about -- I wanted to ensure that Mr. Sassani had -- was actively in treatment, attending his sessions, what kind of treatment was ongoing and to get a sense of his evaluation and diagnostic impressions of Mr. Sassani.

Q. As of that time, what were his evaluations and diagnostic impressions?

A. He also felt that he had Tourette's. He felt that he had a major depressive disorder and some obsessive-compulsive symptoms, perhaps disorder. And he informed me that he was treating Mr. Sassani with psychotherapy and with Prozac, one of the selected serotonin reuptake inhibitors that's used to treat depression and obsessive problems.

A. I think the court reporter would like you to spell the word you said before inhibitors?

A. I-N-H-I-B-I –

Q. No, the word before it?

A. I'm sorry. Selective serotonin? S-E-R-O-T-O-N-I-N.

Q. I'm sorry. This is not a spelling bee. This is going to help out the reporter.

Now, you had pointed out so far that consulting with the neuropsychologist and neurologist, particularly Dr. Hyde said there was a probability that he had Tourette's Syndrome, right?

A. Yes.

Q. Now, Dr. Kleinman reported to you that he had it. Did he confirm the diagnosis?

A. Yes. He felt that -- I can't speak for him, but I think he felt also that it was probable that he had Tourette's Syndrome.

Q. Okay. That's what he's telling you in the springtime?

A. Yes.

Q. Now, did you then take all of this information into account in coming to conclusions about Mr. Sassani's mental condition at the time of the offense involved here?

A. Yes.

Q. And specifically that would be when? When was the date of the offense as you understand it?

A. The date of Count 6, to which he pled guilty, was September 13th, 1995.

Q. And he also stipulated, do you not know, to certain facts pertaining to Count 3, and your understanding of the date of that offense was?

A. September 30th, 1994.

Q. Now, in examining Mr. Sassani's mental condition, you come

* * *

failed and dropped out of college.

Q. Just one question. The woman who presented the analysis to the APA, was she a mental health professional?

A. Yes. As far as I understand, she's a Ph.D. psychologist.

Q. And she studied this phenomenon?

A. Yes.

Q. Now, in the course of your study of the case, as you've told us, you reviewed from some sources the so-called chat room dialogue that was presented to you, correct?

A. That's correct.

Q. Let me ask you some questions about that. Now, when I say that, that chat room dialogue, that involved Mr. Sassani or BigMike8 talking to other people?

A. That's correct.

Q. Now, there are statements made there attributed to BigMike8 that you have taken into account, have you not?

A. Yes.

Q. And statements made by these other people, correct?

A. Yes.

Q. Let me ask it this way. To what extent, if any, does the notion of fantasy work into this case with respect to those bits of evidence?

A. Well, essentially what one finds that the chat rooms are all about is fantasy, from people making up code names

that are used to the kinds of dialogue that go on. These are really

* * *

TESTIMONY OF JOEL KLEINMAN, M.D.:

* * *

Direct Examination

your testimony. You are excused as a witness.

MR. ADELMAN: Dr. Kleinman, please.

JOEL EDWARD KLEINMAN, M.D., Ph.D., a witness produced on call of the Defendant, having first been duly sworn, was examined and testified as follows:

THE CLERK: You may be seated.

State your full name for the record and spell your last name, please.

THE WITNESS: Joel Edward Kleinman. Kleinman is capital K-L-E-I-N-M-A-N.

DIRECT EXAMINATION

BY MR. ADELMAN:

Q. Could you tell us your occupation, sir.

A. I'm a neurologist, a psychiatrist and a pharmacologist.

Q. Okay. Now, where do you practice at the present time?

A. I work for the National Institute of Mental Health. I have a private practice at 5415 Connecticut Avenue, N.W., Washington, D.C.

Q. Okay. Although you and I are fairly close, the system needs to hear you in a good, loud way, so forget me and think about the mike and the Court, okay?

What do you do? What is your general concern and endeavors at the National Institute of Mental Health?

A. I do research, I run a neuropathology section, and I'm the deputy chief of the clinical brain disorders branch, which is

* * *

A. Yes, many.

Q. Is there -- you mentioned it already, but I want to support this -- a relationship recognized by medical science between Tourette's Syndrome and the behavior disorder known as OCD?

A. Yes, there are.

Q. Have you seen patients with this problem before?

A. Yes, many.

Q. Have you diagnosed other people besides Mr. Sassani as having Tourette's Syndrome?

A. Yes, I have.

Q. About how many? Your estimate will do.

A. Fifty.

Q. Have you -- your team, your doctors at NIMH, made similar diagnoses besides you?

A. Yes.

Q. So you're quite familiar with Tourette's?

A. Right. Matter of fact, we're responsible for one of the genetic studies trying to understand --

Q. Of the what studies?

A. Of the genetic studies of Tourette's. We've done a fairly large study. We have looked at identical twins to see what differences in the Tourette's Syndrome are related to the genes and what might be related to other intrauterine environment problems that can occur in this illness.

Q. I don't know how to put this one except directly.
Are you one of the leading experts on Tourette's Syndrome in the United States?

A. Well, I don't know how to answer that one either. The Tourette's Syndrome Association has contacted me recently and asked me to be on their Board, so I think it would be okay to probably say that I am an expert.

Q. Maybe I might approach it like that.
Do people call you from far and yon on the subject of Tourette's?

A. Yes, they do.

Q. Have you written in the field of Tourette's Syndrome?

A. I don't write so much about Tourette's Syndrome. I have written about eye-blinking and tics, and I've tried to

leave a lot of that for Dr. Hyde to do so that he would have his own area to write on.

Q. Doctor who?

A. Dr. Hyde, the other consultant in the case.

Q. Who works with you?

A. Yes.

Q. Now, you mentioned that there is a view in medical science that there's a connection between Tourette's and the behavioral disorder known as OCD?

A. Yes.

Q. Let me hand to you -- the Court's indulgence -- two articles.

Here is the first one, Doctor.

MR. ADELMAN: Government has copies, Your Honor.

(Defendant's Exhibit 14 and 15 were marked for identification.)

Q. First Exhibit 14, and here, sir, Exhibit 15 for the defense.

MS. WILKINSON: May I see this, Your Honor?

MR. ADELMAN: Yeah, I'm sorry.

Your Honor, we have shown these to the Government.

THE WITNESS: I have copies with me. I don't' need them.

Q. Do you recognize those articles?

A. Yes.

Q. Do you know the people or some of the people who authored them?

A. Yes, I do. Quite well.

Q. Are they associates of yours?

A. Henrietta Leonard is a close friend, as well as three of the other authors of the Tics and Tourette's Disorders paper.

Q. That's Dr. Leonard's report?

A. Right. This is an article that came from work done in the National Institute of Mental Health.

Q. Okay. Keeping your voice up and referring to the label number, what is the article you --

A. Exhibit Number 14 is an article that was written by a number of colleagues and friends of mine in the National Institute of Mental Health.

Q. Well, it's called Tics and Tourette's Disorder, A Two- to Seven-Year Follow-up of 54 Obsessive-Compulsive Children?

A. Yes, it is.

Q. And what journal was that published in?

A. That is in the American Journal of Psychiatry.

Q. The other article, Number 15, is entitled The Neurobiology of Obsessive-Compulsive Disorder by Dr. Dan Stein?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Now, this is from the Neuro Scientist, correct?

A. Right.

Q. Both of these journals and these articles are accepted in the field, are they not?

A. Yes.

Q. You, in fact, produced these for the defense, have you not?

A. Right. I pulled these from my file just to make certain points that I thought would be useful in understanding the disorder.

Q. All right. Why don't you tell us what those points are with respect to Tourette's Disorder -- Tourette's Syndrome, rather, and obsessive-compulsive disorder?

A. The only point that I really wanted to make in the first article was the close association between Tourette's Syndrome and OCD, and in the second instance, the second article that I wanted to point out on the neurobiology of obsessive-compulsive disorder, I wanted people to pay

attention to Table 1, which I thought very easily clearly identified some of the common obsessions and compulsions seen in obsessive-compulsive disorder.

In particular, under compulsions that I think were quite relevant, checking behaviors, hoarding, and perhaps rather relevant here under the list for confession, perhaps the need for somewhat undue honesty.

Q. Well, Doctor, with respect to Exhibit 15, there are several boxes in Dr. Stein's article.

A. Right.

Q. I direct your attention to Box 3.

A. Okay.

Q. Headed OCD and Tourette's Syndrome.

A. Yes.

Q. Does that in any way indicate or support your view that there is a relationship between OCD and Tourette's?

A. Yes. That also supports that contention.

MR. ADELMAN: Your Honor, I offer these exhibits in as exhibits for the defense.

MS. WILKINSON: No problem, Your Honor.

Q. Besides those two articles, are there other articles and statements in the medical literature that reflect the same connection to Tourette's and OCD?

A. Yes. The DSM-IV diagnostic manual makes it very clear that patients with Tourette's Syndrome, approximately somewhere between 30 to 50 percent will have OCD.

Q. So you're not saying that everybody with Tourette's is going to have OCD?

A. No, I'm not.

Q. But you're saying that the co-relation with them occurs 30 to 50 percent?

A. That's right.

Q. Now, again without imposing upon your modesty, is it necessarily the case that the -- and I hate to say this, too -- the ordinary doctor could diagnose a case of Tourette's as against a neurologist or someone with your training?

A. They could, but it's been my experience that the diagnosis is frequently missed by -- even by Board-certified psychiatrists.

Q. Is that why you get calls?

A. Yes.

Q. What does it take to make the diagnosis of Tourette's Syndrome?

A. I think for me, what I think is crucial, you just have to be very observant, and I kind of tend to look for little tics all the time, and so when I see them, I get -- I have a high index of suspicion, and then I will tend to pursue that pretty vigorously.

Q. Well, do the tics alone -- and let's talk about Mr. Sassani. Do the tics alone that you have observed with him make the diagnosis?

A. No, they don't.

Q. What else do you need to have in order to make the diagnosis?

A. To make the diagnosis of Tourette's, you also have to have some other symptom, and in his particular case, the one that would qualify is the vocal tic, although I want to make one other point clear.

Even if he didn't have a vocal tic, which he has had, it wouldn't change my opinion about the high incidence of OCD, because just in multifocal tics alone there is also a very high incidence of OCD.

Q. Let's see if I can --

A. So even if we couldn't establish beyond a shadow of a doubt that he had Tourette's Syndrome, if all he had was multifocal tics, which no one in his right mind would dispute for Mr. Sassani, he would still have an extremely high likelihood of having OCD.

Q. So the correlation between Tourette's and OCD also exists between multifocal tics and OCD?

A. Yes, it does.

Q. Does the literature support that?

A. Yes, it does.

Q. Is that your professional opinion?

A. Yes, it is.

Q. In Mr. Sassani's case, besides the blinking, what other multifocal tics did you or others observe?

A. He had some involuntary movements around his eyes besides his eye-blinking, especially on the right side, right shoulder, abdomen, and when he gets under stress, like during the last recess I saw him, his whole face was just ticing away like to beat the band wagon. It's hard to describe how many there were.

Q. Does he have these tick phenomena elsewhere in his body?

A. Yes, especially in his shoulder is very obvious.

Q. Now, during the therapy sessions, did you have occasion to check to see whether he was having or showing the tics then?

A. He's had them every time I've ever seen him.

Q. What does that suggest to you in terms of the chronic nature of the Tourette's Syndrome?

A. Just reinforces the notion I have. I have no doubt that he's had this chronic multifocal tic for years, probably during back into his childhood. Even if that hasn't been established

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kind of irritating. But no, I don't agree with it all.

Q. Well, putting aside your irritation, why don't you agree with it?

A. Well, because, as I stated, I think he has a neurologic disorder that's quite relevant to his psychiatric conditions and to the charges that are against him.

Q. For all the reasons you've stated with respect to your diagnosis?

A. Yes.

Q. What is your diagnosis of Mr. Sassani?

A. I think he has Tourette's Syndrome. I think he has OCD that's associated with that. I think he has a number of neuropsychological deficits associated with attention deficit disorder. And I think he's been suffering, at least in the past, from major depression.

Q. And that's, of course, stated in your letter of November 19th?

A. Yes.

Q. Did the conclusion I just read to you, and indeed Dr. Lion's letter, in any way influence your desire to testify in this case?

A. Yeah, it prompted me to offer my services because I felt that it was really so off target.

Q. Now, do you know of your own personal knowledge how long Dr. Lion spent interviewing Mr. Sassani in person?

* * *

Q. Dr. Kleinman, I want to raise one point with you before we go on relative to Tourette's and Mr. Sassani.

You mentioned a matter of vocal tics, correct?

A. Yes, sir.

Q. Does Mr. Sassani have a vocal tic or tics?

A. He's had a problem clearing his throat, which I think qualifies as a vocal tic.

Q. Now, when you decided to study the case for the purpose of testifying, did you review the charges to which Mr. Sassani pled guilty, Count 6, the possession count?

A. Yes, sir.

Q. And you understand that the images the Government has turned over of child pornography pertain to that count?

A. Yes.

Q. And did you review those images?

A. Yes, I have.

Q. Did you also review the materials, including images, that pertain to Count 3, the count to which Mr. Sassani stipulated to certain facts?

A. Yes, I have.

Q. And did you also review as part of the plea agreement of July 26th in this case a stipulation of facts that the parties agreed to, and Mr. Sassani in particular agreed to, relative to this case?

A. Yes, sir.

Q. Now, I'd like to ask you, in light of your diagnoses that you've testified to and your findings regarding Mr.

Sassani's mental condition, the following: Taking the framework as Count 6 and the facts of Count 3, at the time of this behavior, did Mr. Sassani suffer from the mental disorder that you've described in your testimony?

A. Yes, he did.

Q. And, for the record, what mental disorders are you talking about?

A. Tourette's Syndrome with obsessive-compulsive disorder and major depression and some neuropsychological evidence for attention deficit.

Q. Can we call that ADD?

A. ADD, yes. Thank you.

Q. Did those mental disorders, collectively or individually, impair his ability to process information or to reason?

A. Yes, they did.

Q. I'm just going to ask you to give a brief statement as to why. We'll go back into that later. Could you tell us briefly what that is?

A. Okay. Well, as briefly as I can, Mr. Sassani suffered a number of losses and setbacks, namely the death of his father and the loss of his job, which precipitated depression, but this was more like to happen because of the underlying neurologic disorder, and the areas of the brain that were involved that would predispose him to depression, namely his prefrontal cortex and this right hemisphere dysfunction.

Once he got depressed, it's my opinion that that exacerbated his obsessive-compulsive disorder, which was

part of his Tourette's Syndrome, which led him -- and you have to understand that obsessive-compulsive disorder is really an anxiety disorder, and so one of the manifestations of exacerbating this was that he would become more anxious. One of the ways that people appear to deal with this increased anxiety is by becoming more obsessive or more compulsive.

In this particular instance, he became more -- he had more OCD, which manifested itself in collecting all these pornographic pictures, and to some degree probably in the trading of them in order to get more still.

Q. All right. Let me follow up on that with some more questions.

A. Let me just add one more thing to it.

Q. Certainly.

A. I really don't' think that -- I don't think that at the time that he was doing this, and I think this has changed with treatment, that he fully appreciated -- was able to reason and understand the implications of the illegal behavior he was engaging in.

Q. Why do you say that?

A. In the course of the therapy with him, it became very clear to me that he did not appreciate fully how wrong it was to be collecting child pornography and/or sending these images. One of the examples that he would give at times was that he wasn't a pedophile, which he's not, okay, and that this -- he was -- that the crime of that would be much worse, for instance, than the child pornography.

But in the process of doing therapy with him, and we were able to reason through this a bit, he came to appreciate

what exactly was wrong with the child pornography and with sending pictures.

I don't think he fully appreciated the fact that the law is made the way it is, at least in my opinion, because of the motivations that are involved in child pornography and what was really wrong with that, whereas -- not the pedophilia is excusable, but that in itself is an illness, and I don't think he fully appreciated the implications behind what this law was passed for and why it was stated the way it was.

I don't know if that helps, but that's what I'm trying to say about his reasoning was definitely impaired.

Q. And along those same lines, I think you've answered this, but is your testimony to the effect that these mental conditions contributed to the commission of the offenses involved?

A. Absolutely, yes.

Q. Now, you understand that Count 6 has the relevant date of

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IN THE UNITED STATES DISTRICT COURT
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THE HONORABLE DEBORAH K. CHASANOW,

DECEMEBER 13, 1996

DEFENDANT'S ORAL ARGUMENT

* * *

was September 13th; and, of course, we don't quarrel with the fact that he obviously accumulated these over time. He didn't get them in the house the day before. That's what the psychiatric testimony went to.

And, of course, the transmission count I believe is September 3rd, '84, some nine months before, excuse me, April 30.

But, in any event, Your Honor, it was right during the same time, and indeed one of the images that supports count three, there are only five, Your Honor, also, is obviously supporting count six, so therefore he would be double-counted in violation of the guideline rules as Your Honor did not group.

So we believe, based on this submission, unless the Court has a question, that the Court should group these, the count of plea and the count of stipulation. Thank you.

THE COURT: Okay. I think I should turn to Mr. Adelman first on the departure request --

MR. ADELMAN: Yes.

THE COURT: -- in behalf of Mr. Sassani.

MR. ADELMAN: Yes. There are two aspects of this, the legal and the factual. We certainly have briefed up the legal side for the Court, with one exception, and that's the Withers case that came down after our computer went to work on Goossens, but I wanted to address some salient points here.

We think the key case for Your Honor on the legal side, the Glick 946 Federal Second, happens to be written by Judge Wilkins, but that's all right.

There, Your Honor, he made the point -- he wrote Goossens, too, but he reiterated that the mental disorder entitled one to a downward departure need not be the sole causative factor, just that it need to have played a part in the crimes.

Secondly, Your Honor, from reading the government's paper, I get the sense -- well, I see that they're arguing, seem to be arguing, that functional disorders, like depression, can't be the basis for a downward departure.

Well, the Court will, starting with a case such as Glick, you'll see that there are numerous cases in the Fourth Circuit and elsewhere that allow downward departure based on any sort of mental disorder.

Glick, the evidence introduced by the defense through a well-credentialed psychiatrist was that the defendant suffered stress anxiety, and it sometimes didn't relate to reality. I think that's the way it was phrased, I'll

stand corrected, but it's a fairly close quote.

Neither the Goossens case nor the Withers case undercut that. In fact, Glick was cited in Goossens by Judge Wilkins.

There are numerous cases we've cited in our papers from around the country that say any sort of mental disorder qualifies.

Now, when we get to the facts of this case, of course, we'll outline this, but I would say, Your Honor, now, we have presented extensive testimony from Dr. Fiester and Dr. Kleinman, that shows not only depression, major depressive episode, but neurological disorder and Tourette's Syndrome that led to obsessive and compulsive disorder. And I'll specify that in a minute.

But on the legal side of it, here I don't think there can be any fair argument by the government that as a matter of law, the disorders testified to here, either separately or apart, can't qualify.

Goossens is unique, and I've tried to make that clear in the papers and now Withers is unique.

In those cases, Your Honor, the downward departure was almost an afterthought by the district judge. There is really no hearing, no psychiatric testimony in Goossens.

My recollection is that the judge just looked at a psychological report and decided that, although she couldn't depart because of cooperation with the government, she depart sue sponte, if you would, based on the psychological report. There was no full hearing or elaboration of the testimony, like this Court graciously allowed us.

Same thing in Withers. Withers is a case where the judge departed based on scant psychological evidence by a psychologist that had been retained, who had analyzed the defendant and only came up with sort of transitional depression, or problems relating to mood disorder, and it's not that these don't qualify if properly established in the evidence. According to Goossens and Withers, it's just in this case it wasn't sufficient.

Moreover, both of those cases say that the evidence, such as it was, failed in the causation part, too. In other words, they never met the Glick test of causation.

And, for instance, in Withers, Your Honor, the psychological testing was done three years after the offense. And the defendant only saw the psychologist once. We didn't have a complete forensic analysis, as we've been presenting to the Court on the defense side.

So Withers does not stand for any legal proposition that bars this Court from issuing a downward departure. Indeed, it somewhat supports our position.

I also want to mention that in Goossens, Your Honor, Judge Wilkins cited C A N T U, a Ninth Circuit case prominently, both for the standard and also for disorder.

In Cantu, the person was found to suffer from post traumatic stress disorder, which is certainly not a neurological disorder. Again, the Ninth Circuit granted departures. Cantu's been cited by our circuit here without any quarrel. In fact, it's cited a couple times.

Finally, with respect to Goossens -- and, again, we filed at the same time, so I didn't necessarily read the government's papers when we filed -- certainly Goossens doesn't stand for the proposition that we have to establish to the Court that the mental disorder totally obliterated Mr. Sassani's ability to reason and process information.

Indeed, they haven't established that. They haven't said that in either the Goossens opinion or later. In fact, if you read Goossens, after that, after that particular line in Goossens, you'll see citations to four circuit court cases, one of which is Cantu. Those four cases don't say that at all.

In other words, they don't say that you have to have a completely obliterated ability to reason or process information, because, if you did, you wouldn't be competent.

Later on in Goossens, the Goossens court talks about simply impaired ability to reason or process, and that's what, at the most, Goossens stands for.

I submit to Your Honor, based on Glick and the other

cases, that the standard here in this court now is still simply whether a mental disorder contributed in any way to the crime. But I wanted to argue that point, too, just so the Court gets the full statement or our position.

I will pass on to the factual side, if Your Honor wishes. If the Court has any questions on the law, I'd be happy to try to answer them.

THE COURT: Go ahead.

MR. ADELMAN: Your Honor, on the facts, first of all, we have put on, with the Court's permission, and we thank the Court for that, a full presentation here, full as I can recall, analysis of a man's mind. I've done this for some time, in some settings and I can't recall any parallel situation at sentencing where somebody has, or somebody's come in and told the Court so much about a person.

We believe, quite clearly, Your Honor, we've established, first of all, significant serious mental disorders on the part of Mr. Sassani that contributed to the crimes charged.

Let me just -- and I know Your Honor's heard this evidence recently, so it need not be gone over line by

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GOVERNMENT'S ORAL ARGUMENT

If I understand the testimony right, Mr. Sassani collects pornography because he's compelled to collect pornography, and it's completely circular. There is no, well, why does he feel compelled to collect pornography, and why didn't he collection it prior to 1994?

I would suggest, as Your Honor did, because that's when he found the computer, and that's when he realized that all this stuff was out there, and it was a veritable candy store for a person who was interested in all his life in pornographic

images.

It is very difficult to understand what Dr. Kleinman was saying, and it gets down really to going back to the Goossens and Withers statements about the ability to process information to reason. And that was an important point that I spent a lot of time on with Dr. Kleinman.

I believe if you look at page 83 and 86 of his testimony, Your Honor, at the first thing that was very clear from Dr. Kleinman's testimony is that Mr. Sassani knew what he was doing was morally wrong. He knew that the collection of kiddie porn was morally wrong.

And then go -- if you go to page 86 of his testimony, we -- the next step would be, well, did he know that it was illegal?

And, yes, Dr. Kleinman says he did know that, he believes that he, Mr. Sassani, knew that his behavior was illegal.

We don't only have the psychiatrist's view of that, we have that letter in August of 1995, a month or six weeks before this FBI goes in and raids Mr. Sassani's home, we have him being told that in fact this kind of activity is illegal, so we know two things.

And actually three, because Mr. Sassani has now admitted that he knew that he was collecting child pornography, and we know he knew that it was morally wrong, and we know that he knew it was illegal.

So where, where is the inability to process information to make a reasoned judgment about the collection of pornography, the commission of the offense in this case?

And even though it is not the government's burden to be able to articulate that, I truly have tried over the course of the last couple of months to understand where that comes from.

And I am at a loss, Your Honor, because it just makes no sense.

So the bottom line, I guess, if you will, for the

government in terms of their position, Your Honor, is that Mr. Assassin was sad in February of 1994. His father had died, and this caused him to not feel maybe himself for a

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DEFENSE SENTENCING EXHIBIT #1

FLOPPY DISKETTES

Mr. Sassani's 382 floppy diskettes were analyzed with the following results:

1. They contained a total of 6731 files.

2. Of these, 5618 files were typical home computer program files (i.e., spread sheet programs, data base programs, word processing programs and the like).

3. Of the remaining 1113 images, 933 depicted adult material or non-sexual material.

4. There thus remained 120 images depicting children.

DEFENSE SENTENCING EXHIBIT #2

HARD DISK DRIVE

Mr. Sassani's hard disk drive on his computer was analyzed with the following results:

1. It contained a total of 16,226 files.

2. Of these, 12,380 files were typical home computer program files (i.e., spread sheet programs, data base programs, word processing programs and the like).

3. Of the remaining 3846 image, 3790 depicted adult material or non-sexual material.

4. There thus remained 56 images illegally depicting children.